No. 269.

Brf. of Dunlap & Kenna for Def.

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OCTOBER TERM, A. D. 1899.

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JOSEPHINE DESERANT, Administratrix of the Estates of Henri Deserant, Jules Deserant and Henri Deserant, Jr.,
Plaintiff in Error,

vs.

CERILLOS COAL RAILROAD COMPANY,
Defendant in Error.

In error to the Supreme Court of the Territory of New Mexico.

Brief and Argument for Defendant in Error.

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IN THE

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STATEMENT.

As we did not receive plaintiff in error's brief in time to prepare our own, we have been obliged to prepare this brief mainly in view of the one filed by plaitiffn in error in the Supreme Court of the Territory. Since certain unwarranted and erroneous conclusions of fact were stated in the brief filed in the Territorial Supreme Court, and also the one filed in this court, and are repeated, we prefer here to make our own statement of the facts and call attention to evidence in support of the material questions, referring to the *marginal* pages of the printed transcript.

Three actions were brought to recover damages on ac-

count of the death of plaintiff's husband and two sons working with him, caused by an explosion of some kind or other at or in the neighborhood of room 16 in the fourth left entry of the mine where the deceased were working as coal miners at the time, and in which entry-way they had been working for some time prior to the accident, having worked in these mines nearly a year. (Tr., p. 51.)

Plaintiff's theory, or rather assumption (for it is without support from any fair consideration of the testimony), is that the explosion was caused by ignition of gas permitted, it is claimed, to accumulate at the upper end of room 8, due to a want of sufficient air current, claimed to have been obstructed by a body of water in the passageway of the fourth left back entry and before reaching room 8 in question; that two workmen, named Flick and Kelly, had been directed by, or had gone with, the pit boss Donahue (also killed by the explosion) to take up a track in room 8, which room had been finished a few days before; and that these men, or one of them, in violation of well-known orders and the custom in that mine, had passed over and disregarded a plain and well-known danger signal placed in this room, and had gone beyond such signal for some purpose or other and, using naked lights, had ignited gas. But how the explosion occurred in fact no one can tell. It is altogether a matter of surmise and conjecture.

The negligence, as claimed, was in permitting the air course in the fourth left back entry to be obstructed by such a body of water as would render ventilation insufficient in the rooms off the fourth left entry, finished and unfinished, so that it is claimed there was not a sufficient current passing through room 8 to carry off the gas. As

found, however, by the Supreme Court of the Territory, the evidence did not sustain this position, but was decidedly to the contrary.

The system of ventilation in itself was perfect and afforded more than twice the amount of ventilation prescribed or generally deemed necessary.

The mine and its workings are described in the testimony of J. C. Porterfield, and his testimony will be easily comprehended by following the map of the mine.

The main slope or entry into the mine was driven down on the seam of coal, with the dip thereof at an angle of from twelve to fourteen degrees, and extended a distance of about twenty-five hundred feet. On each side of the main slope, and at a distance of thirty or forty feet, there was also driven along with the main slope parallel slopes, leaving a body of coal. At short distances while these slopes were being driven, as will be seen, cross-cuts were made through the bodies of coal between the main and the parallel slopes; and as a new cross-cut would be made through, the old cross-cuts were boarded up in the center of the pillars and sand and dirt thrown up upon each side, so as to make them air-tight and prevent as much as possible the passage of air through the same, thus making an air channel or course along the main slope. (Tr. marg. p. 328.) Commencing near the top and going down as the work of excavating coal proceeded, and at distances of about one hundred and fifty or two hundred feet from each other, and on either side of the parallel slopes, a pair of entryways would be driven together at right angles to the main slope and upon the seam of coal for quite a distance. There would be a body of coal between these entryways about thirty feet thick, and at distances of seventy feet or more this body

would be cut through by a cross-cut of the same width as the entryway; and whenever a new cross-cut was made through which air would be carried, the old cross-cut or last one would be boarded up in the center, and dirt, slate and refuse filled in on either side, so as to fill up as much as possible the old cross-cut and prevent air from passing through the same. (Tr. p. 328.) These entryways were numbered, as "First right," "Second right," "First left," "Second left," etc., depending on the side of the main slope in which it was located. The lower entry would be designated as the "Back entry," or air course, and would necessarily be lower down according to the dip of the coal than the upper or main entry parallel thereto. In driving these entryways a man and car would be necessary to take out the coal excavated in making them, and the cross-cuts, so that they were usually about nine feet wide and the height of the thickness of the coal, which was in the neighborhood of six feet. Off from the upper or main left or right entryway they would proceed, beginning at the slope, to excavate coal by making rooms, and these rooms would extend up to and at least one of them through into the preceding back entryway which had been driven. A room would be started from the upper entryway by excavating a passageway about nine or ten feet in width for a short distance, known as the "neck." They would then widen out the space, usually on the left side, so that an excavation about twenty feet in width would be made and continued until the room was finished. So it will be seen that a room would be driven and worked upward with the elevation of the seam of coal; and that the face of the room, where the men would be working in driving the room farther, would be the highest part of the room.

The system of ventilation was the best known, and had been approved by the governnent mine inspector, who made monthly tests to determine the quantity of air afforded to the men thereby. It consisted of a fan at the upper shaft which revolved so rapidly as to exhaust the air from the mine, so that outside air, with its well-known pressure of sixteen pounds to the square inch, would be forced down the main slope or main entryway to the bottom thereof, and then forced to each side of the mine, and by means of curtains, known as brattices, hung at appropriate places in the passageway, would be directed, so far as the left side of the mine was concerned, up through whatever openings had been made in the sixth left entry, going through the back entry, and then through the upper entry thereof, then conducted up through the fifth left back entry so as to reach every part thereof, and then around into the fifth left upper and through rooms in the same into room 1, which had been broken through into the fourth left back entry; then along the fourth left back entry as far as the same was driven, which was over a thousand feet from this room off the fifth left entry; then through the last cross cut into the fourth upper left entry, and by means of brattices hung from this cross-cut up to within several feet of the end or face of the fourth left upper entry, it was conducted around the face thereof; then on the other side of the brattice up room 18, which was just being driven; then into room 17, which was a new room; then through the upper cross-cut between 17 and 16 into room 16, and forced by these curtains up towards the face of room 16 as far as it had been driven; then it would go around the curtain in room 16 and through the upper cross-cut into room 15, and so on from room to room through the upper cross-cuts,

and by means of the brattices or curtains forced up towards or in the direction of the face of each room until it reached room 6, which was broken through into the third left back entry. Part of the air would then go into the third back entry, and the other part, by means of brattices, would be conducted through the other rooms of the fourth left entry into the rooms off the plane—that is, the rooms driven towards the main slope, and then it would be conducted around again into room 1 and through that room into another part of the third back entry. Then it would be forced into the various rooms off the third main entry, some of which were being still worked and some of which had been finished, and would then be forced into the rooms in the second main entry, and then into the first back entry, and then forced through an over-cast above the main slope or entryway, where it would meet the air returning from the right side and would then go up the shaft to the fan.

The fourth left main entry was driven about one hundred and fifty feet longer than and beyond the back entryway. Room 8 off the fourth left entry had been completed on Sunday night a couple of days before the accident, the explosion occurring Wednesday morning between half-past ten and eleven, February 27, 1895.

There would be more or less gas in the mine, and seams containing gas were likely to be struck by the miners while they were driving holes or blasting coal in making their rooms. (Tr. pp. 148 and 149.)

Duggan was the superintendent of the mine and had general charge of it. Donahue, who was killed in the explosion, was day pit boss, and Kilpatrick was night pit boss. There were two fire bosses under them, one Ray, who was the night fire boss (that is, he went on duty at

night), and one Dighton was the day fire boss, going on duty in the day time. The fire boss during each shift would go all through the mine, and particularly in the rooms which were being worked by miners, to ascertain whether any gas had accumulated in any of such rooms. As the next shift came on, the men in the same would pass by the cabin in which this inspector or fire boss was, and he would give the miners their lamps, either safety or others, and tell each one the condition of the room in which he was to work; and if there was gas in any room he would tell the miner who was to work there how to remove the same, giving him a safety lamp, or else instruct him to wait until he went down and removed it. There was also a general mine inspector, Fletcher, who made a general periodical inspection of this and other mines to determine their general safety.

If gas was found in any room beyond the little quantities which might be found in the uneven spaces in the roof, it would naturally be forced to or seek the highest place in the room, being lighter than the surrounding air. Gas would be usually removed from the working places by hanging curtains from the last cross-cut up towards the face of the room, which would force the air current up in that direction and around the brattice or curtain, and thereby carry off the gas with it up into the shaft and out of the mine. In order to insure the current of air going into the rooms and around the faces of the working places, curtains or brattices would be hung across the upper entryway a distance of fifty or one hundred and fifty feet apart, and as a mule and car would be driven through such entryway, while one curtain might be forced up thereby, the other curtains would be down, thus preventing a current in that di-

rection. Still, there would necessarily be a sufficient quantity of air in the upper entryway—and in every room, for that matter, and especially in the lower part of every room—to permit men and animals to work therein, as the gases would go to the highest point. The purpose of the air current was to remove or sweep out the noxious gases which might otherwise be inhaled by the miners, who would be working, as a rule, at the faces of their rooms. The water, if any, in the rooms would drain down into the entryway and pass into the lower or back entryway, and it will be noticed that in the fourth left entryway, about opposite rooms 4 and 5, there was a depression, but there were also depressions farther along, so that some water would accumulate in there, and especially along the lower side of the fourth left back entryway in different places and in different quantities.

A siphon was used to draw the water out of this sump or depression in the fourth left back entryway, and it passed down through room 1 in the fifth left entryway, and the water was then carried on down into a sump in the seventh left entryway. (Tr. pp. 292, 293, 299.) The fifth and sixth left entries were perfectly dry; so that all the water found in the sump in the seventh left would come from the fourth left back entry. (Tr. p. 301.) The evidence tended to show that this siphon was running up to the time of the accident, and that at no time was there any such quantity of water in the fourth left back entryway as prevented the passage and circulation of air through the same and into the rooms of the fourth and the third left of more than double the quantity of air required. The main testimony of the plaintiff as to the quantity of water was what appeared some days after

the accident, and from the appearances of a water-mark, when it was manifest also that the siphon had evidently been stopped by the explosion, that a great mass of dirt in the cross-cuts had been blown into the back entryway, and all the water in the back entryway, as well as ties and other refuse, were blown down the same into the sump, thereby necessarily increasing the height of the water. (Tr. pp. 156, 157.)

With reference to room 8 it appeared, as stated, that on Sunday night, scarcely three days before the accident, the room was being finished up; the air circulation was good; there was scarcely any gas in the room, and the two miners working there were working with naked lights, having their safety lamps hung up, so that the brattice extended as far as it was then sufficient to force the air current to the face and carry out with it any gas generated in the room. The brattice in that room was in good condition at all times when inspected and extended to a distance of about ten feet from the face. The distance from the last cross-cut between rooms 8 and 9 to the face of room 8 was a little over 110 feet, and brattice extending from the lower side of the cross-cut up toward the face would be about the same length.

Ray, the fire boss, was a witness for the plaintiff, and testified that the last time he visited the fourth left air course was Tuesday night immediately preceding the day of the accident, but he did not visit the faces of rooms from 5 to 11, because they had all been finished and he did not deem it necessary. The last time he visited the face of room 8 was on Monday night preceding the accident. He then says he found a little gas extending back ten or eleven feet from the face of the room. That is, he would find it on the roof or ceiling about ten feet from

the face, which would show that there might be a wedge-shaped body of gas extending between a horizontal line ten feet from the face and the top of the roof, or only a small quantity in an uneven space in the ceiling. In accordance with the well-established custom and well-known rule or order (Tr. p. 149) of that mine, well-known to all the miners and to the deceased, he placed two fire marks or signals in the room, one *ten* or *twelve feet* above the cross-cut in question between rooms 8 and 9 and on the track, which would be at least seventy or eighty feet below the gas, and the other a little below the cross-cut, which would make it below the brattice and on the track. This signal consisted in placing upon a tie two X's, and usually the word "fire," and the name or initial of the fire boss, and placing the tie across the track. The understanding was that no one should go beyond this signal or mark with a naked light, as it indicated that gas might be encountered beyond that point. He says he reported the fact that the room was making gas to Donahue, the pit boss.

The room had also been inspected on Monday morning by Dighton, the other fire boss. He found a little gas in the room near the face and placed his fire-marks on a tie which he put a little above the cross cut. They did not deem it necessary to do anything more, as the room was a finished one. No miners nor anyone else were expected to go to work in it.

As stated, the cause or origin of the explosion is altogether a matter of conjecture and surmise. It is clear, however, that the greatest evidence or effect of explosion and of fire appeared in the neighborhood of rooms 16 and 17 in the entryway thereabout, and some powder cans were found exploded, and coal dust was found coked on some of the pillars and the back of a car, and a car loaded

with coal moved several feet off the track. The Deserants, it will be remembered, were working in room 16. It might have been caused, as the miners were getting their powder ready about that time to prepare their shots, by some negligent or accidental ignition of powder, which would instantaneously set fire to the coal dust, which more or less impregnated the air and the entry-ways, and to any particles of gas which might be found in the hollows or crevices; so that death would be caused either by concussion or by the afterdamp produced by the explosion. (Tr. pp. 121-4, 135, 336, 337, 340, 341, 383, 384.)

Again, the explosion might have been caused by some miner, in making his hole, suddenly striking a seam or body of gas which would be ignited by his light and thus ignite the powder near at hand.

Two men, ordinary laborers, known as Flick and Kelly, were found in room 8, Kelly's neck being broken, evidently by concussion. The one body was found in the cross-cut between rooms 8 and 9 with his feet towards 8; and the other body was found in the room near the cross-cut. The fire marks or danger signals were also found in this room, more or less blurred. The canvas brattice, of course, was found knocked down, as it was knocked down in the other rooms. Men were found dead in the entry-way near rooms 16 and 17 and in some of the other rooms up in that direction. A portion of the track in room 8, near the cross-cut and opposite thereto, had already been taken up.

Plaintiff's contention, without support of the evidence, is that Donahue, knowing that there was some gas in room 8 (assuming that the same had not been removed in the meantime), directed these two men to go into

that room with a naked light and take up the track, and it is assumed that these two men disregarded the fire signals and went with a naked light beyond the same and caused the gas in the room to explode. It is assumed by one of the miners in his opinion that it was a gas explosion, and that the explosion ran against the air, or through room 9 into room 10, into room 11, into room 12, into room 13, and so on into the entryway; whereas the plaintiff's theory is that the current of air was too feeble to take the gas out of room 8. Room 7 does not seem to have been affected, and the posts in room 8 were slightly scorched only for a short distance near the cross-cut, and only slightly in the cross-cut leading into room 7; but no disturbance is shown at or near the neck of the room or in the lower part thereof.

It is manifest that if the explosion were caused by the ignition of a body of gas in room 8, there being air in the lower part of the room and in the upper entryway adjacent, a combustion would have taken place between the air and the gas, generating a new gaseous body with such force, rapidity and volume that it would have gone in the direction of least resistance and certainly would have been felt the greatest in all parts of room 8 and in room 7, the adjoining room; and as there would be a sudden expansion caused by the combustion there would be immediately, and as suddenly, a contraction causing a loud report. Here should have been found the greatest effect of the force and violence. But it was not so. It was found in and near rooms 16 or 17. (Tr. p. 385.) A body found in the neighborhood of room 16 was found to be burned, while the bodies of Flick and Kelly in room 8 do not appear to have been burned, although the posts near the cross-cut and in all the cross-cuts leading into

the upper rooms to room 17 were more or less charred. But the greatest evidences of fire, so far as the charring and force and violence were concerned, appeared in the neighborhood of rooms 17, 16 and 15.

So plaintiff's case is dependent upon the assumption and the presumption, without support of evidence, that the accident was caused by reason of Flick and Kelly disregarding or not heeding a plain and imperative signal of danger (Tr. pp. 142, 179, 210, 233, 289); that Donahue had sent them into a place of danger with a naked light, and that the gas had not been removed from room 8, although Donahue had been advised of its being there; and that gas accumulated in room 8 and extended down to the cross-cut where the bodies of Flick and Kelly were found, because it is assumed the air current was obstructed by water in the fourth left back entry and thus did not carry the gas out above the brattice or at all.

A more rational and plausible presumption is that the explosion occurred in the vicinity of the place where the greatest effects appeared and were shown to exist after the accident, and that it was a powder explosion, which ignited or caused the coal dust to be stirred up and set aflame.

All the evidence shows the air current was good. The gas could not extend below the end of the brattice. The men when found were a hundred feet away from any possible gas, and it was not shown they were using *naked lights* at the time. So the bottom drops out of plaintiff's case.

There is direct and positive evidence that within half an hour immediately prior to the explosion, at the last cross-cut between the fourth left back and main entries, to

reach which the air would have to travel over the water which was claimed to be the obstruction, the volume and current of air passing through the fourth left air course was in every way good and of the same quality and force that was customarily passing through the mine, and which was sufficient to carry off all the gases in the mine, and which had carried off all gases generated in room 8 during the time that room had been worked. (Tr. pp. 281, 282.) Moreover, if the air current had been bad and deficient, Deserant, as well as the other miners working at the faces of their rooms in the fourth left, would be the first to notice the same, not only upon their lights, but the smoke of powder from blasting in their rooms would not be carried off, and they would have complained to the foreman. (Tr. pp. 147, 338.) The lack of a current itself would be manifest to miners working near the faces where it would have to pass. The evidence all shows that the operation, management and condition of the mine were in every way good, and had been good for a long time prior to the day of the explosion; that measurements of air taken by the defendant's employes and by the government mine inspector showed that the circulation of the air in the mine was good, and the means by which the air was circulated was also in good condition, and that no complaint of any kind as to the air current had ever been made. (Tr. pp. 105, 150, 186, 246; Tr. pp. 247, 268; Tr. pp. 279, 285; Tr. pp. 286, 302; Tr. pp. 303, 307; Tr. pp. 315, 348.)

It was further proved, though it is also self-evident, that with the usual air current passing into room 8 and around the brattice, gas could never accumulate below the end of the brattice from the face, because the gas would always go to the upper end of the room, and the

moment the volume spread down to the air current passing around the brattice it would be swept out with the air; so that if gas were being made in room 8 it could not extend down to the brattice, and, therefore, not beyond ten feet from the face. This would be a distance of at least ninety feet from the cross-cut where the bodies of Flick and Kelly were found. The cross-cut through which the air current passed was about nine feet wide, and the space between the brattice and the wall, in which space the air current would pass, would be a distance of about ten feet, and the volume of air passing through that space would go up around the upper end of the brattice and towards the face of the room.

Even if there was some obstruction due to water in the fourth left back entry-way, this would not prevent the usual volume of air from passing into the fourth left, because of the vacuum which was being created by the ventilating fan on the other side of the alleged obstruction. The force of the outside air pressing in to fill up the partial vacuum created would necessarily send the same volume over the obstructed course, but with greater velocity than if the entire back entry were wholly unobstructed. As a matter of mechanics this is manifest, and the evidence was to that effect. (Tr. pp. 222-225.)

For over a month, every day and night, water was hauled out from the seventh left, which was the place where the siphon emptied the water from the fourth left air course. (Tr. p. 300.) The siphon was seen working a number of times prior to the accident. It was the source of the water hauled out from the seventh left (Tr. p. 300.) There is not a scintilla of evidence in the entire record that this siphon did not and was not at the time of and prior to the explosion performing its entire duty. (Tr. pp. 285-302.)

The intestates knew this was a gassy mine, that gas was likely to appear at any time, and knew that their own room was making or was apt to make gas. (Tr. pp. 202-203).

Competency of Employes.

Not a particle of evidence was introduced as part of plaintiff's case tending to show that any employe at the time of his employment was incompetent or known to be so; nor was there any attempt to bring to the company knowledge of any failure to perform any duty by such emyloye after his employment. The main point taken was that it appeared from the defendant's witnesses that Donahue and the two fire bosses had been elevated to their positions within a couple of months prior to the explosion. Donahue was an old, experienced miner, and so were the other men. Their duties were not complicated or difficult of comprehension. The evidence showed that they understood what their duties were. It would be strange if the elevation of a man in the service of the company should be regarded as evidence of negligence.

The superintendent was a man in every way qualified and competent for the position he held. (Tr. pp. 14 2, 169.) He had superintended this mine nearly two years prior to the accident and showed that he was familiar with its workings. No negligence in any event is attributable to him as being the cause of the accident. In addition to the superintendent, there was employed a general mine inspector named Fletcher, who periodically examined the mine to see to the safety of the appliances and the method of ventilating and working the mine. The day pit boss, Donahue, was a competent man. There is not a word in the record against his com-

petency. (Tr. pp. 258, 333.) The night foreman was competent in every respect. The record shows that he performed every duty with which he was charged. (Tr. pp. 150, 186-217.) The fire bosses understood their duties and knew how to perform the same, and they performed every duty incumbent upon them, and were in every way competent for the positions they filled. (Tr. pp. 65–69, 247–268.)

We will briefly refer to the evidence of each witness pertinent to the main points, for it is all important to a proper understanding of this case to consider carefully the nature and character of the testimony given.

References will be to the side or marginal paging of the transcript.

Evidence for Plaintiff.

J. W. Ray, who was night fire boss in the mine at the time, having been such from January 1st, and having been an assistant fire boss in mines in the Indian Territory previous thereto, and who showed that he was thoroughly familiar with his duties, testified that when he was first shown around the mine and into the fourth left back entryway there was some little water in the depression, but he could not say how much; that there was always some water there, and there was also a siphon to drain the water out of that air course, though he paid no attention to ascertain whether it was running or not. (Tr. p. 60.) The water was in the neighborhood of between two and three hundred feet in length; so that, instead of going through the back entryway to get to the rooms in the fourth left to test them for gas, he would, after passing from room 1 in the fifth left entry, go up the back entryway to the main slope and then into the fourth upper or main entryway and down to the face of the same to the last working room--18. If water had been taken out of this place it would have shortened his run. (Note—But it

is evident this would not make a difference of more than five minutes, if that much.) He claims that he complained to Donahue about having too much work, and was promised an additional man shortly before the accident. His duties as fire boss were to go to every place where the men were or would be working and see that it was safe before they went in—that is, free from gas; and one of his duties was to hang brattice or canvas where necessary to turn the current of air. Wherever there was gas being made, if it was not carried out, he would place a fire-mark or danger signal at such a distance therefrom that the miner would see it in time so as not to pass over it with a naked light. (Tr. p. 61.) When he found gas in a working place he would give the coal digger a safety lamp, unless there was too great a quantity. (Tr. p. 62.) On Tuesday night before the accident he did not visit room 8 and several other rooms in the fourth left, because they were finished and he did not think it necessary. On Monday night, when he visited the face of room 8, he found a little gas extending about ten or eleven feet from the face, and *he put his fire-marks in the room, one about ten feet above the last cross-cut and the other below.* (Tr. p. 63.) He did not again visit room 8 or remove the gas, because there was nobody working there, and he says he was crowded with his work, but told Donahue that there was a little more gas there than usual. He was not again in room 8 until a week after the explosion; but on the day of the explosion, after he heard of the same, he went into the mine some time afterward and went into water in the fourth left air course almost up to his arm-pits. By hanging up curtains they succeeded in carrying air through the fourth left entry up to room 16, where they found a dead body. (Tr. p. 64.) They found another body in room 16, burned on the hands and arms. In room 13 they found another body not bruised or burned. *He was familiar with explosive gases and understood the duties of a fire boss, and if there had been any danger threatening the lives of workmen he would have removed it.* (Tr. p. 65.) It was his duty to put curtains so as to throw the air around the faces wherever there was gas, and he always

performed that duty. These brattices were put as near to the face as was deemed necessary to circulate the air in that neighborhood. *When he made his last inspection in the fourth left the brattices were in position as near as they could put them.* The miners knew that when he discovered explosive gases he would place his fire marks there. He did not remember whether he was in room 8 once or twice on the morning prior to the explosion. (Tr. p. 66). It was either Monday or Tuesday evening that he told Donahue that room 8 was making more gas than usual. Donahue's body was found in the cross-cut at room 11, but he did not see him until after he was taken out. On Monday night, when he last inspected room 8, the brattices or curtains were in position and there was a little gas between the last post of the brattice and the face, and this would be directly in the air current. *He put his fire-marks in this room ten or twelve feet above the last cross cut.* (Tr. p. 67.) He also put a fire-mark below the cross-cut. It was his custom to put three or four crosses and the word "Fire" and the date thereon, and such mark meant that men should not go into the place so marked. *This was the means adopted in the White Ash Mine to indicate to everybody that they should not pass that point, and this was known to everybody working in the mine.* He had noticed the pipe of the siphon in the fourth left entryway going around into room 1 of the fifth left and down the slope, but did not know how far the pipe extended, as he had nothing to do with it, and it might have been running prior to the explosion. (Tr. p. 68.) Water in the fourth left entry would run back into the lower air course and accumulate on the lower side. Other persons may have gone into room 8 after the last time he was there. He could not say how much water there was there (in fourth left back entry), and it was not on this account that he asked Donahue for assistance, though he claimed it was one of the things. (Tr. p. 69.) *He had fulfilled his entire duty as fire boss before the explosion.* He had marked room 8 because he knew the air would not carry all the gas out without extending brattice farther up. As that mine was operated he was not compelled to go back to room eight after he had put a fire-

mark there. (Tr. p. 70.) *He would not have allowed any miners to go to work if he believed any portion of the mine was dangerous. Gas is lighter than air and seeks the high places in the room*, and before gas could have filled room 8 it would have spread through every room along the entire entry. (Tr. p. 71.) After the explosion, when he went into room 12, he found a cartridge two and one-half feet long filled with powder. (Tr. p. 72.) This was about a week after the explosion. Men working in the fourth left air plane came out uninjured. (Tr. p. 73.)

JAMES MERCHANT was boss driver on the day shift at the time of the explosion, and was at the bottom of the mine. They tried to get into the fourth left where the explosion was, and by the use of curtains finally got as far as room 12, but were forced back. They then tried to go through the back entry and came to the water, but could not wade through and turned back to the main entry. They then crossed into the back entry beyond the water. This took some time. The cross-cuts had been blown out so that they could go through the same from the main to the back entry. It was his duty to see that rope-riders hauled the water when they had no coal to haul. *The water from the fourth left air course would run through the siphon pipe down through room 1 of the fifth left and through the parallel slope to the bottom of the mine.* (Tr. p. 75.) *There was a water bailer on the night shift to fill tanks at the bottom of the mine for the rope-rider to haul out.* Pit Boss Donahue had his head crushed. He saw evidences of the explosion on the plane of the fourth left—that is, near the slope. After the accident, it took them until late in the afternoon to get air to the face of the fourth left. (Tr. p. 76.) There was little water taken out on his shift. Some of it was taken from the bottom of the mine and some from another sump on the right side. *The water from the fourth left back entry siphon ran to the foot of the main slope.* (Tr. p. 78.) The "slope" (probably siphon) was running just before the explosion. (Tr p. 79.) They found smoke everywhere inside the door. (Tr. p. 80.)

J. C. PORTERFIELD testified that within two hours after the explosion he was at the siphon pipe and helped to carry water to put in the pipe. (Note—Evidently the top or cup had been blown off.) He had seen the pipe running before the accident, but could not tell how long. After the explosion he was at the lower end and turned on the valve, and the syphon started running. (Tr. p. 81.) Rule 17 provided that all employes were requested to report any unsafe places to the mine boss, who should at once have the same repaired, and permit no one to enter therein until it was put in proper condition, etc. (Tr. p. 81.)

PHILIP ROLANDO testified that he hauled water out of the mine, and there were water cars to haul water from three or four places, including the seventh left, from which a little water was hauled, and also from the foot of the slope. His orders were to hoist water when there was no coal to take out. He could not say how much water was taken out per day in January or February. He knew nothing about what was done on the other shift. (Tr. p. 83.)

J. W. BECK testified that he was a miner employed in the mine from January 4th. At the time of the explosion he was working in room 15, in the third left entry, when he felt the concussion, and was made deaf for a time. He encountered the afterdamp in the third entryway, but was finally rescued. (Tr. p. 84, 85.) He was never in the fourth left entry.

O. W. ALEXANDER, who operated some mines of his own, but on a small scale, testified that he visited the mine after the explosion as coroner's juror. This would be about five days after, on March 4th. (Tr. p. 90.) They went into the fourth left back entryway and came to a body of water. He waded in to the tops of his boots. They then went in to the upper entry and through the cross-cut to the back entry beyond the water, then through the same and into the upper entry at the end. They then went through the different rooms to room 8. Between room 8 and the last of the working

rooms, which would be 18, he saw evidences of terriffic explosion, also of fire on posts and timbers, and there was a strong smell of burnt rags. He gave it as his opinion that the explosion was caused by an ignition of firedamp, and that it originated in room 8. (Tr. p. 91.) (Note—This opinion is worthless as evidence, because it is based upon suppositions of fact which the witness assumed, not substantiated by the evidence; and the cause of the explosion is, moreover, not a question of expert testimony, but for the court to determine in the first instance under the evidence, and where there may be a conflict of evidence, if any, then by the jury.) He says that the fact that the explosion was of firedamp was shown by the tremendous force with which everything in that part was thrown about, he previously knowing of presence of firedamp in that mine. It was impossible, in his opinion, to have any other kind of explosion in that entry except a gas explosion. (Note—And yet he had not been in that mine for a year previous, and at this time, notwithstanding the water in the back entryway, the air was passing in a sufficient current through the last cross-cut and through the various rooms. The tremendous force was not manifested in room 8, but in and about rooms 16 and 17.) (Tr. p. 92.) Props were charred on the side towards room 9 and slightly charred on the side towards room 7. He did not go up to the face of room 8. In room 12 the force of the explosion seemed to have been stronger, and *the greatest force was spent or shown in rooms 16 and 17 or 15 and 16.* (Tr. p. 93.) The roof and bottom of the entry, where the water was, formed a depression. He claimed he saw no evidences of exploded powder, but found powder cans flattened. (Tr. p. 94.)

THOMAS LEADEN testified that he was a coal miner and member of a legislative committee to investigate the cause of the explosion. He had worked somewhat in the mine in 1893, and a little while afterwards in January, 1894; but had then only driven the fourth left entry in about thirty feet. He went into the mine with the coroner's jury five or six days after the explosion. They came up through a room to the fourth left air course, and

in that room they could see where the water ran down, and there were timbers, ties and things lying in the air course, washed down by the water. (Note—More probably blown down by the force of the explosion.) They came to water in this air course, but did not go through. One man stood on one side and the rest went around the upper air course through the cross-cut to the other side of the water, and they saw on the other side of the water a light held by a man remaining there. There was a water-mark on the lower side of the air course, which seemed to show where water had been, and it appeared about three inches from the roof on the lower side. The air course was about five or six feet high and nine feet wide, except at the fault, where it was about six feet wide. They went from room 18 as far as room 8, and then out. (Tr. p. 96.) The filling of the air course with water was what caused the accident, in his opinion. (Note —This is pure assumption on his part, as he knew nothing of the condition of the mine before the accident and failed to take into account that a lot of dirt, debris and all the water on the lower side of the back entry would be blown into the depression or sump, and thereby raise the height of the water there to a considerable extent.) The water extended for five or six hundred feet and seemed to be in one body, but the water they could not get past seemed to be about three hundred feet long, and there was water lying back on the low side. He saw the light held by the other man across the water. (Tr. p. 97.) He knew there was gas in the first left entry when he was driving it, and there was gas in the slope or course when he was driving that. (Tr. p. 98.) The length of the water in the air course was three hundred feet on the high side, but more on the lower side. (Tr. p. 99.) *Air in the second air course would have more impurities than it would in the fourth left air course, because it would have to first pass through the fourth left air course.* (Tr. p. 100.) An explosion flies against the air; and his theory was that the explosion occurred in the fourth left and flew against the air, and encountering water in the back entry blew out the stoppings. (Note—The evidence showed the stoppings were blown the other way,—back into the fourth left air course.) The explosion did not reach the third left en-

try. There were no obstructions in the rooms between room 8 and the rooms in the plane of the fourth left, but the explosion would naturally fly against the air and it would be coming with the air if it flew back that way. The explosion started in room 8, in his opinion, and flew back through all the cross-cuts, and they found burnt props showing it flew back that way to where the air was coming. Note—This theory fails to take into consideration the air which would necessarily be in the lower part of room 8, and also in room 7, as well as in the upper entry way.) (Tr. p. 101.) There was no trace of any flame from room 8 towards the slope. There was no indication of flame on the side of room 8 towards the slope. He examined the face of room 8, and *there was indication of flame for about fifty feet from the last cross-cut up towards the face.* It was more than fifty feet from the cross-cut to the face. (Note—It was over a hundred feet.) He examined all props in room 8 for more than fifty feet above the cross-cut. (Tr. p. 103.) The only place where he examined coal on the side of room 8 towards the slope was at cross-cut leading into room 7. The flame did not extend to the entry in room 8, as it would have to go one hundred and twenty-five feet to get there. (Note—Yet if it started in room 8 it would have to travel a great deal more than five or six hundred feet and in a tortuous passage to get to room 17 or room 18.) There were indications of flame in rooms 18, 17, 15, 12, 11 and 10, but *there were no indications of flame at the neck of room 8.* The force of the explosion did not go to the plane instead of to the face of the entry because it was a gas explosion, which goes against the air, and there must have been some air coming around in the direction of room 8. (Tr. p. 104.) (Note—According to chemical laws, combustion would take place wherever there was air to mix with the gas in proper proportion, and there would be air in room 8 and in room 7 and towards the plane.)

Evidence for the Defense.

Joseph Fletcher, mine superintendent and inspector of coal properties, arrived at the mine on Friday following the explosion and went down into the same. He also went down with the coroner's jury. When he first went down he found a car off the track in the fourth left entry. In room 17 there was evidence of a shot having been fired. (Tr. p. 109.) When the jurors went in (five days after the explosion) some of them started to walk in the water and then turned back and went to the further side of the water edge, where they could see a man hold a light or candle on the other side. *The stoppings in the cross-cuts between the main and back entries had been blown out and down into the back entry.* There were cans, debris and props scattered all along the entry. There were also little depressions in the entry where there was a little water standing from six to eight inches deep. (Tr. p. 113.) All the cross-cuts but the last one in this entry had been filled up *before* the explosion with dirt thrown on both sides of a wooden partition in the center of the cross-cut. (Tr. p. 114.) *Stoppings were blown down from the fourth left front into the fourth left back entry.* The fourth left back entry was nine feet wide and the thickness of the coal (Tr., p. 115); for in excavating the back entryway the coal excavated would have to be hauled through the same by the cars and mules as in other parts of the mine. (Tr. p. 117.) These cross-cuts were entirely filled up after they had been driven. *Sixty-six cubic feet of air per minute is sufficient for one man in the mine.* (Tr., p. 118.) For twenty-four men there would be required 1,584 cubic feet. They followed the air current and went into the cross-cut between rooms 7 and 8 on the following Monday. (Tr. p. 119.) At the face of the fourth left main entry they found canvas blown down. (Tr. p. 120.) *At room 15 there was a powder keg near the first cross-cut going up the room spread or blown up; also one about the mouth of the room. He thought there were two between that and room 16, and there were either two or*

three inside the car of coal which was on the track in the entry, but the car was off the track when he saw it, and there was coke on the back end of the car an inch thick. The air current passed by the car, but not against the back end. (Tr. p. 121.) Props were charred and there was coke on the car from dust, which would be carried with the flame. *Particles of dust would be coked traveling with the flame and would lodge in whatever they came in contact with.* He examined all props from room 16 up to room 8. As they passed through room 16 through the last cross-cut the props were charred on the side traveling outward, and as you would go up into where the face of the room was it would be charred up to the face of the room. The flame would go through into the next room and char the props and return down to the cross-cut, or up if the cross cut were above the inside cross-cut, and would then go up or down, as the case might be. Right back at numbers 9 and 10 it was the same way. He was up to the face of room 8. *The props above the cross cut in room 8 were not charred at all.* (Tr. p. 122.) He went through the cross-cut into room 7 and returned. In rooms 15, 16 and 14 he found boxes scattered and a cartridge standing in some room against the coal. *He had examined other explosions.* (Tr. p. 123.) *In his opinion this explosion was through powder ignited at or near room 16. There were no indications of a gas explosion.* (Tr. p. 124.) The ventilation of this mine was sufficient prior to the explosion. *Before the air could reach the third left back it would have to pass all the rooms of the fourth left from room 6 before it would reach men working in rooms on the third left.* (Tr. p. 128.) *Fan exhausted ventilation from the mine by causing a vacuum, drawing gases out with the air.* (Tr. p. 129.) Dip of coal measure twelve to fourteen degrees. The main slope was driven on full dip of coal. (Tr. p. 130.) *Exhaust of the fan was 48,000 to 50,000 cubic feet per minute,* (Tr. p. 131.) *If explosion occurred at 10:45 men would be loading their coal and preparing for firing shots—drilling holes, making cartridges and tamping holes ready to fire at noon.* A windy shot is where a hole is drilled too far in the solid, and where the one charging the hole gives too small a charge to per-

form the work. Not having powder enough to blow out the coal it blows out the tamping. *Flame would be produced from a gunning shot.* (Tr. p. 133.) He once saw the effects of such a shot previous to the explosion extending seventy feet. Two miners would be apt to have in one room twenty-five pounds of powder. (Tr. p. 134.) At the time he investigated after the explosion in the fourth left he found *powder cans rent open and blue cast over cans, indicating powder had been exploded. There was one at or near the mouth of room 12; one at or near the cross-cut in 15; three between 16 and the car; two in the inside between the car and rooms 17 and 18, near the cross-cut. As quick as the powder would explode it would produce flame, dust would rise in small particles in the air and be ignited.* (Tr. p. 135.) This would ignite gas if it came in contact. (Tr. p. 136.) If gas in room 8 were ignited above the last cross-cut and near the end of the curtain, it would fire all the gas in the room, the canvas would be blown down and scorched and the props would be charred. In room 8 he went up to tie set across, with fire boss' mark, about fifty or sixty feet above cross-cut. *Props were charred beside the cross cut, but up near the face the props were not charred at all.* (Tr. p. 137.) There was not a particle of gas in room 8 when coroner's jury was there. *Alexander made no inspection.* (Tr. p. 139.) He (witness) inspected this mine scores of times. (Tr. p. 140.) Duggan was competent superintendent. (Tr. p. 142.) He examined the roofs of rooms off the fourth left after the explosion. *The sides and roof of the fourth left had blue cast, showing flame had been through there.* The little coal in room 17, where that shot had been fired, showed that the back of the shot was left in, and very little coal was lying in the room. The fire boss leaves a mark after he inspects a room for gas. (Tr. p. 143.) Tie chalk-marked "XX" indicated danger. (Tr. p. 144.) Afterdamp results from powder explosion. (Tr. p. 145.) *The miners themselves would first notice if air was insufficient. If noticed, they would complain to foreman. If the air current was stopped, black gas would accumulate and take away the breath.* (Tr. p. 147.) If air

in the fourth left was obstructed the men working in the third left would notice the conditions sooner than in the fourth left, as the men in the third left would be short of air before the men in the fourth. *Men in drilling holes may tap a seam of gas, or in breaking in the roof.* (Tr. p. 148.) *If any man walked over a danger signal placed on the track, or passed such signals marked upon the coal, he would violate the orders in that mine.* He knew Night Foreman Kilpatrick over seven years (Tr. p. 149.) He was competent. (Tr. p. 150.) There was evidence of flame in room 8 above the second cross-cut. There was no flame above the tie. (Tr. p. 155.) *Props near the face of room 8 were not charred.* Evidence of explosion was plain on the side and roof of the fourth left entry. The stoppings of all the cross-cuts were blown back into the air course. (Tr. p. 156.) *The stuff would blow down the air course and fill up the entry.* (Tr. p. 157.) After the explosion there was not enough water in the back entry to obstruct the air. (Tr. p. 158.) *Effects of the explosion showed greatest force around rooms 17 and 18.* (Tr. p. 162.) *This seemed to be the origin of the explosion.* (Tr. p. 163.) Twenty-five thousand cubic feet of air would ventilate that mine, if carried to the faces. Four or five thousand feet would dilute or carry off any gases that were given off there. (Tr. p. 171.) If powder exploded in the neighborhood of room 16 or 17, there would be an instantaneous explosion of different quantities of gas in any part of the fourth left, and the flash would be as quick as lightning. (Tr. p. 176.) If there was no current of air at the face of room 8 there would be no current at the face of room 9, nor at the face of room 7. (Tr. p. 177.)

William Kilpatrick—night foreman and coal miner for over sixteen years. The White Ash was a gaseous mine. (Tr. p. 191.) There was very little leakage of air through the cross-cuts, as board brattice would be put up in the center and canvas placed over the same, and loose dirt and stoppings thrown up again t each side to make it air tight. (Tr. p. 191.) *He was in the mine six hours before the explosion.* He had been all over the mine, in every working place, going to work Tuesday

night at seven o'clock. (Tr. p. 192.) *He went through the fourth left that night, and the ventilation was good. He tested it in different places with a pit lamp and conversed with miners about it.* His duty was to examine all the working places and condition of the brattice in each place, and the circulation of air going around the same. (Tr. p. 195.) *On the night prior to the accident he inspected the air course in the fourth left back and also the air course in the cross-cut between the fourth left back and the main entry, and found the air good and same as it had been for several weeks prior.* (Tr. p. 196.) On the night prior to the accident he went up to the face of the fourth left main entry, one hundred feet from the last cross-cut. (Tr. p. 197.) He made such inspection every night at least once, and sometimes at important points two or three times, and in respect to ventilation made inspection every night. (Tr. p. 199.) On Saturday night preceding the explosion he made inspection for gas, taking the fire boss' place. He examined every working place in the mine with a safety lamp. He went into room 8 to the face. Brattice from the cross-cut up was in good condition. (Tr. p. 200.) He found gas in upper left hand corner of the room as you go into it from room 9, going up the track. There was a current of air passing around the curtain or brattice through room 8. This was the fore part of Sunday night. There were *two men working at the face of this room with naked lights.* (Tr. p. 201.) *There was good ventilation passing through the room, then carrying off the gas. Deserant and his two sons were working in room 17 at the time of explosion, and had been working in the fourth left the week preceding the explosion.* (Tr. p. 202.) One week preceding the explosion the eldest boy requested him to take safety lamp which had been given to them to test a cross-cut they were driving to connect room 16. He took the lamp and showed him a little body of gas and brushed it out. The father and brother were working there with him. They knew the means used in that mine to designate in a locality the presence of gas. (Tr. p. 203.) In making inspection his custom was to test air at the last cross-cut of the fourth left. (Note—This would be beyond the water and after the air had passed over it.)

Air current furnishes respiration for men and mules, and carries off powder smoke from the shots and noxious vapors generated in the mine. (Tr. p. 204.) *A hole drilled five or six feet, taking too large a grip of coal, not charged with enough powder or not properly tamped, will blow out tamping or powder and come in a sheet of flame out of the hole, making a windy or gunning shot.* The powder was taken in twenty-five pound kegs. (Tr. p. 205.) The fire boss would make a trip of inspection in three or three and one-half hours. He would indicate a dangerous place or presence of gas to miners by throwing a tie or piece of board across the track, marked "X" or "XX." (Tr. p. 209.) If this was in a working place the miner would have his instructions. *In any other place he would have no business to go over this dead line.* (Tr. p. 210.) If he found gas, he would go back twenty, thirty or forty feet from the face and put a tie or piece of plank across the track marked with his initials, date of month and year, and if there was much gas put "XX," if little "X." (Tr. p. 211.) *This custom and meaning was well known to the miners.* (Tr. p. 212.) When he heard of explosion he tried to get into mine. He went into the fourth left and bratticed cross-cuts, and drove the air ahead until they could get to room 10. (Tr. p. 213.) After the explosion, and after he was able to, he went into room 8, only as far as the top cross-cut between rooms 8 and 9. This was between two and three o'clock in the afternoon. The brattice was knocked down. (Tr. p. 214.) Room was strong with afterdamp. He saw a body lying in the cross-cut. He didn't take it out. There was a tie with fire mark on it almost in front of the cross cut, a little below, if anything. Several other ties had been torn up, and loose rails, and there was a sledge hammer and some tools lying in the cross-cut. (Tr. p. 215.) Ray's fire mark was on the tie. (Tr. p. 216.) *If there was an obstruction in the fourth left back entry the full volume of air would come into the fourth left, as the air belonging to the left side would travel over the partial obstruction with greater velocity,* probably with a loss by friction against the obstruction. (Tr. p. 222.) *But the same quantity of air would pass*

through if there was an obstruction. (Tr. p. 223.) *Air travels with a greater velocity in narrow places.* (Tr. p. 225.) There was always some water lying in a portion of the fourth left back entry, and he went around it. (Tr. p. 226.) This water came from working places in the fourth left. (Tr. p. 227) The men were working in the face of room 8 Sunday night; worked with *naked lights.* (Tr. p. 229.) The brattice then ran up ten to fifteen feet of the face of the room. The fire boss did not report any gas there after that. (Tr. p. 230.) Sunday night was the last night room 8 was worked. He had nothing further to do with it unless he got special orders from Donahue regarding finished rooms. (Tr. p. 236.) After the explosion he saw the body of Kelly lying in the cross-cut of room 8. He went into the room (the second time) straight from the main left entry. He did not go into the cross-cut. (Tr. p. 238.) Kelly was lying in the mouth of cross cut off room 8, his feet towards room 8, on the lower side of the cross-cut, lying as though he had fallen into the cross-cut from the room. *Did not see Donahue's body there.* He was four feet from Kelly's. (Tr. p. 239.) He saw Donahue's body brought out. He was badly burned in the face, as if he had been in considerable dust or some substance that had gone into his skin. He was black—so black it was quite a while before they could identify him. (Tr. p. 241.) *There was always a sufficient quantity of air passing around the face of the fourth left entry, and all the rooms through which it passed.* (Tr. p. 242.) The velocity of air is greater beyond the brattice at the cross-cut of the fourth left entry. (Tr. p. 243.) *Air current in room 8 Sunday night was good at the corner of the canvas, carrying off the gas generated there. The fact that there were dangerous places, and places where gas was generated, was known to everyone working there.* (Tr. p. 245.)

JOHN DEIGHTON, day fire-boss, examined all working places before miners went in. He went into all working places on the fourth left and examined for gas. The last time he was in room 8 was Monday morning before the explosion. He found some gas and put his mark up there. (Tr. p. 248.) *He put a danger mark above the*

last cross-cut on a tie —do not remember how many crosses. *He went near the face of room 8. The brattice was in good condition.* He was at the face of the fourth left that morning. (Tr. p. 249.) He inspected other rooms there and found a little fire-damp in two roome. (Tr. p. 250.) *He usually put up two or three danger signals at every inspection.* (Tr. p. 253.) *He put up danger signals in rooms where the Deserants worked. They were familiar with these signals.* (Tr. p. 254.) If there was gas in a working room, would tell the miner how to brush it out and sometimes assist him. *His business was to put up brattices and curtains, and he always performed that duty.* (Tr. p. 255.) When explosion occurred he was in the second left entry putting up curtains. (Tr. p. 257.) Donahue was a careful and competent man for his position After explosion he went into the fourth left entry. (Tr. p. 258.) The stopings in the cross-cuts between the main and the back fourth left were blown out. They put curtains across the mouths of the rooms and brought fresh air into the fourth left. (Tr. p. 259.) *He did not go back to room 8 after Monday morning because he considered it an abandoned room, and had the necessary fire mark up there. The ventilation was good before the explosion.* The door at the parting of the fourth left was closed when he went there after the explosion. (Tr. p. 260.) Inside of the door the room was filled with dirt. There was a car off the track, and the trapper boy lay in there about dead. On each side of the door it was filled with dirt and dust about two and one-half feet. The body of the boy and the car were outside of the door. (Tr. p. 261.) They went as far as room 10, then put up curtains on cross-cuts between two entries, then went through a cross-cut into the main entry and found a body. (Tr. p. 262.) *The props in and about room 16 were charred the most.* He went into that entry again at 9 o'clock the same night and took out Kelly and Flick's bodies then. (Tr. p. 263.) *He went into room 8 from the mouth off the main entry and found Kelly's body at the corner of the last cross-cut. Flick's body was opposite the cross-cut in the room.* He did not notice whether the bodies were burned. There was some

brattice lying down in that room. (Tr. p. 264.) The door in the fourth left entryway at the parting was not broken. (Tr. p. 266.) The trapper boy would open the door for the drivers coming through and keep it closed at other times. (Tr. p. 267.) *He noticed no difference in the ventilation on the morning of the explosion, when he made his inspection.* (Tr. p. 268.) *He had put up danger signals in room 17, where the Dexerants were working. Every man working in the mine knew what the fire boss' signal was. When he had placed signal in room 8 he had performed his full duty.* (Tr. p. 275.) He reported gas in room 8 to Donahue. (Tr. p. 276.)

ED SULLIVAN, mule driver in fourth left entry, on day of explosion was taking out cars from rooms 17 and 18. (Tr. p. 279.) *He came out at 10:30 a. m., and went to the fourth right, when he heard a noise.* (Tr., p. 280.) *He was at the face of the fourth left entryway at the last cross-cut and at room 18, and the air was all right at 10 o'clock and 10:20 a. m.* (Tr. p. 281.) *The draft from the current of air in the fourth left cross-cut between the back and main entries was so strong that it caused the light in his cap to blaze and blew it down in his face; so he took the light off his cap and held it in his hand.* (Tr., p. 282.) He met Donahue that morning inside the trap door in the plane. (Tr. p. 283.) This was when he made his last trip. He was then going in the fourth left main entry. He had seen Flick when going in once that morning at the mouth of room 8, but not as he was coming out. (Tr. p. 284.) *The condition of the air at 10:20 on morning of explosion and within half an hour thereof, as he found it, was same as it had been for fifteen or twenty days previous, and he would know whether the air was good or not.* (Tr. p. 284.)

JOHN HUNT was boss driver and superintended the hauling of water out of the entry. (Tr. p. 287.) *He hauled water out of the mine every night that he was boss driver.* He hauled it out in January and February. *He hauled from three to seven trips on the shift every night in February.* (Tr. p. 289.) *There would be eight cars to the trip. He never found any difficulty in the ventilation. Its condition was good.* (Tr. p. 289.) *The siphon in*

the fourth left back entryway siphoned the water into the seventh left. (Tr. p. 292.) *When the siphon was running it went into the sump in the seventh left.* (Tr. p. 293.) *He had no reason to believe that the fourth left air course was obstructed by water.* (Tr. p. 296.) Two crosses known among miners as the danger line, over which no one was to cross. (Tr. p. 297.) *There was no time in February while hauling coal out of the mine that he did not have time to haul water. If there had been such occasion he would have worked overtime.* In the second week in January he was put on one night as night boss and went through every entry. *He hauled water out of the seventh left entry every night in February.* (Tr. p. 298.) *This water came from the siphon in the fourth left to a sump in the seventh left.* (Tr., p. 299.) The siphon from the fourth left might have been running a week before explosion. He saw it running, but couldn't tell when. (Tr p. 300.) *The water running into the sump in the seventh left came from the fourth left siphon, as there was no water from the fifth or sixth, both being dry.* (Tr. p. 301.)

JOHN W. FLEMING, United States coal mine inspector for New Mexico, inspected this mine about every thirty days. (Tr. p. 302.) He was in the mine January 24th before the explosion. He took measurements of air in most places with anemometer. Donahue was with him. (Tr. p. 303.) Duggan accompanied him several times. *White Ash Mine was in very good condition.* (Tr. p. 304.) Measurements the last time before explosion above the split of the seventh right and left, 16,470 cubic feet per minute; on the seventh right, 4,462½ cubic feet; on the seventh left return, 9,100 cubic feet. At the fourth left last cross-cut there were 4,814 cubic feet. (Note—1,848 cubic feet would have been sufficient for number of men working in there.) At the third left connection with room 6, there were 9,120 cubic feet. (Tr. p. 305.) Air going into the mine, 42,120 cubic feet per minute. Where it returns from the right and left air courses, after going through the mine, it was 42,900 cubic feet. (Tr. p. 306.)

ROBERT MCKINLEY, a miner, was working in a room in the second left at the time of the explosion. The air was

sufficient for himself and two men working with him then. Crosses were used as fire danger signals. (Tr. p. 310.)

JAMES DUGGAN—superintendent one year and nine months before the explosion. (Tr. p. 316.) He knew how mine was ventilated and described the air course. (Tr. p. 317.) Fan, at the speed it was running, exhausted 30,000 cubic feet of air per minute. Impurities were carried out and fresh air forced in. (Tr. p. 318.) There were twenty-seven or twenty-eight men working in the fourth left and on the plane at the time of the explosion. The fan, running at the usual speed, made seventy-five revolutions per minute. (Tr. p, 319.) He was used to safety lamp. (Tr. p. 320.) Donahue was day foreman, whose duty it was to look after all the men, see that they attended to their duties, and about getting out coal and looking after the safe condition of the mine. (Tr. p. 321.) He started into mining when thirteen years old and had worked in mines and mills—all kinds of mines—for twenty-five years. He was familiar with every working place in that mine. (Tr. p. 323.) He made thorough inspection of all places in the mine, himself and the foreman, three weeks before explosion. This included every abandoned and working place accessible. Everything was then in good shape. The fire boss' duty was to make daily inspection of working places. (Tr. p. 324.) Marks were used by fire bosses to indicate localities where miners should not go, and were sign that no one should cross over, except fire boss with a safety lamp. The foreman might go over with a safety lamp and investigate. (Tr. p. 325.) The air was measured by himself every ten days with anemometer. *He took measurements February 9th* (Tr. p. 326), *also February 23d (three days before explosion), after working hours.* The main intake was then 28,700 feet; seventh left, 5,202 feet, etc. (Tr. p. 327.) Rooms from 12 to 18 in the fourth left were being worked at the time of explosion. (Tr. p. 330.) The water was taken out in water cars The rope rider had charge of taking out water. *There were no orders given to haul coal in preference to water.* (Tr. p. 331.) Donahue was competent. (Tr. p. 333.)

Heard of explosion about eleven o'clock. He went to mine and into fourth left, and remained in mine until 12 o'clock that night, until they got all the bodies out. (Tr p. 335.) He finally got into fourth left through last cross-cut. He assisted getting bodies out from the rooms. He found timber and props badly burned and scorched. Some canvas was burned and scorched. *Several powder cans were rent asunder and coal dust blown up from floor of room on end of cars partially coked. He was in rooms 16 and 17.* (Tr. p. 336.) *He there found coal dust coked, and props more burned in that vicinity than in any other part of the entry.* The stopings in the cross-cuts between main and back entry were blown into the air course from a point along rooms 14 or 15. The stopings there were good on the Saturday before, and the air as good as usual (Tr. p. 337.) *If the air became deficient it would be noticed by the miners from the effect on the flame of their lights, and powder smoke would remain around in their places. The miners would complain to the foreman then.* He examined the fourth left and rooms a week after the explosion with the coroner's jury. (Tr. p. 338.) There was water in the fourth left back. He went through all the rooms of the fourth left. (Tr p. 339.) *A car loaded with coal in room 16 or 17 was blown off the track. It weighed five thousand pounds. The greatest evidence of explosion was in the vicinity of room 16. The props in these rooms were more burned than in any other part. That was the only place he found coal dust coked,* and car loaded with coal moved several feet from the track. The explosion extended as far as room 8 and a little beyond and in the opposite direction to the face of the fourth left entry and returned or rebounded to fourth left back entry. (Tr. p. 340.) *There were seven or eight kegs of powder rent asunder. The kegs were of sheet iron and would weigh twenty-five pounds each.* (Tr. p 341.) There was fire boss' mark in room 8. He thought it was six or seven feet below the last cross-cut. It was slightly blurred or blotted out at the time. He saw it with the coroner's jury. There were tracking and ties directly opposite the cross-cut. (Tr. p. 342.) He familiarzed

himself with underground workings, etc. (Tr. p. 348.) There was water in the fourth left air course for three or four months, but not near the roof. There was a siphon pipe there. (Tr. p. 356.) It was Donahue's duty to know if water interfered with air (Tr. p. 357), and his duty to report it to him. There was more or less water in nearly all the air courses. There was a low place in there. (Tr. p. 358.)

He did not know there was gas discovered in room 8 Sunday night, extending ten feet. (Tr. p. 361.) *Fan was not running to full capacity when he took measurements February 23rd.* (Tr. p. 369.) He found some props in room 8 slightly scorched. The props up towards the face of room 8 were less scorched than those farther down. There was very little evidence of fire twelve or fifteen feet from the face of room 8. (Tr. p. 379.) There was none farther up to the face. (Tr. p. 380.) *His opinion powder exploded.* It was a combination of powder, coal dust and some gas. (Tr. p. 383.) *The explosion occurred when the men would be making up cartridges and handling powder. The powder being ignited would ignite coal dust, which impregnates air in coal mines, and if there was any gas it also would be ignited.* (Tr. p. 384.) He assisted in taking out all bodies except Flick and Kelly. (Tr. p. 388.) He was in the mine the eight days prior to explosion, except Sunday. If everything was in proper condition the current of air would carry out the gas in room 8. *The danger signal was sufficient protection.* (Tr. p. 406.) *Fire mark by fire boss was all that was necessary, in an abandoned place, if there was any gas* (Tr. p. 415.) *Room 8 was an abandoned place.* (Tr. p. 416.)

Plaintiff's Rebuttal.

Charles Kelly, the brother of Kelly who was killed, went to mine after explosion to find body of his brother. (Tr. p. 451.) *He found his body in the back entry of the fourth left, as he understood it. He did not know the number of the place where he was. He did not know a thing about the mine. He had never worked there.* There

were three bodies,—Donahue's, Kelly's and another man's. (Tr. p. 452.) His brother had his neck broken. *He couldn't tell how they were lying. He did not pay attention to how they were lying.* He was in a hurry to get his brother out. The first body he found was a stranger's; the next his brother's; the next Donahue's. The body of the stranger must have been five or ten feet from Donahue. He couldn't tell. Donahue was about five feet from brother. He went into the mine about a quarter after six Thursday (Tr. p. 453), the day of explosion Four other men were with him. He didn't know them, nor their names He had never met them before. He was there when they found Donahue's body. (Tr. p. 454.) His face was pretty black. He knew him. The men led him in. He didn't know the number of the places. They took up his brother's body and Donahue's at the same time. They took his brother's body out first. (Tr. p. 455.) He didn't go back after his bother's body was taken out. He didn't examine the condition of Donahue's body. (Tr. p. 456.) He paid no attention if they brought him up at once. He didn't know the names of any of the men with him. (Tr. p. 457.) *He had only been there a few days when the explosion occurred, and was a stranger.* They took Flick's body out first. (Tr. p. 458.) They got his brother's body out between half past eight and nine o'clock at night. (Tr. p. 459.)

Defendant's Rebuttal.

James Duggan testified that Donahue's body was brought out of the mine at four o'clock in the afternoon. (Tr. p. 459.) He could only recognize it by his clothing and cast of features. The bodies of Flick and Kelly were the last ones taken out. This was about eleven o'clock at night. (Tr. p. 460.)

John Deighton testified that Flick and Kelly's bodies were the last ones taken out. (Tr. p. 461.) He took them from the parting. They encountered Kelly's body first; then Flick's. It was between ten and eleven

o'clock at night. Donahue's body had been taken out before. He carried a safety lamp when they went into the room. Archie Chambers and others were with him. When they discovered the bodies of Flick and Kelly they did not discover Donahue. (Tr. p. 462.)

JAMES MERCHANT testified that he went into the mine at seven o'clock in the evening after the explosion. Donahue's body was then on the slope at the mouth of the fourth left entry. (Tr. p. 465.)

(Note.—It may be charitable to treat Kelly as being mistaken in saying he saw Donahue's body at all, or that he saw his brother's body till it had been removed from room 8. On the first trial the evidence showed that Donahue's body was found in the cross-cut between rooms 11 and 12, and no one pretended to testify he was near room 8 at time of explosion. This apparent defect in plaintiff's case was attempted to be remedied by calling Kelly in rebuttal, when, if his testimony was pertinent to plaintiff's case, he ought to have been called at the opening. He was a stranger there, and old friends of Donahue had great difficulty in identifying his body even after it had been taken out.)

SOME MIS-STATEMENTS BY PLAINTIFF.

On page 9 of opponent's brief it is stated that "no witness was produced who had seen the siphon working within a month of the explosion." This is in a large sense untrue, as will be seen from the foregoing abstract. While, perhaps, no living witness was at the lower end of the siphon who was able to testify as to any specific or definite date when he saw the water running therefrom, yet a number testified that it was running, and the best evidence of this was the fact that the water in the sump in the seventh left all came from the fourth left air course,

and the water from this sump was hauled out constantly on the night shift during that month and the preceding month. Donahue, who probably knew the actual condition, was dead. It is also stated that the "siphon required starting by hand." This siphon worked like the ordinary siphon. When once filled with water it continued to run until stopped by turning the valve or by some force or cause.

Again, on the same page, it is stated that the "water was within three inches of the top on the low side when the coroner's jury went in to the mine four or five days after the explosion, although the hoisting engne had been working night and day hauling water during all the time of that explosion and the going down of the coroner's jury." The latter part of the statement is without foundation in the evidence (marg. p. 378), and the former part is incorrect. One of the witnesses testified that when the coroner's jury went down into the mine he saw a water mark about three inches from the top on the lower side, but no witness testified that at that time the water was within three inches of the roof of the lower side. It appeared at this time that the stretch of water was about two or three hundred feet long, but it also appeaerd that for a month or more before that the stretch of water was about that length, and yet during all of that preceding time the evidence showed that the air current after passing beyond the body of water was more than sufficient, and the air current when the jury were in the mine was amply sufficient to ventilate the side they examined and the rooms off the fourth left entry.

The statement on page 12, that "the slope leaked more than 60 per cent before the air reached the bottom of it" is pure assumption and mere guess work.

The statement on page 13 under the "fourth" head that "if there had been no obstruction in the fourth left air course there would have been no occasion to open a stoping to allow the air from the upper air course to pass to the men on the plane of the fourth left entry," is fallacious, for it will be remembered that after the air passed through the rooms in the fourth left main entry and when it came to room 6 after having passed room 8 it was split up, a large part of it going into the third left back air course and the other part being diverted into the rooms off the plane, and from thence back into room 1 and thence into the third left air course, so that those rooms off the plane would never have as much air as had passed through room 8.

The statement on the same page that "the evidence establishes beyond a reasonable doubt that the obstruction by water of the fourth left air course and the accumulation of gas in rooom 8 of the fourth left entry combined to cause this awful calamity," is as disingenuous as it is brazen in view of the unanimous finding to the contrary of the Supreme Court of the Territory, and of all the evidence, as shown in our abstract, to the effect that the air current was at all times amply sufficient; and further, Deserant and other miners working at the faces of the rooms in the fourth left entry would be the first to notice whether the air current was good or bad, and yet no complaint appears to have been made by any of the miners as to the air current in that entry.

It will be remembered that Kilpatrick testified that in examining as to the condition of the air he usually talked with the miners themselves in regard thereto, though he also applied his own tests.

On page 15 of opponent's brief it is stated:

"On that Sunday night Kilpatrick, the night foreman, found two men working in that room with a *safety lamp.*"

The very page of the transcript referred to (page 122, marginal page 229), contains the following answer of Kilpatrick:

"On the seam on the top side of the room I filled the davy lamp. The men were working there with *naked lights.*"

It appeared, from other parts of his testimony, that their safety lamps were hung up in the room, not being used. It is difficult to understand why such a deliberate mis-statement should be made.

On page 17, speaking of finding the bodies of Donahue, Flick and Kelly, it is stated:

"All three had the ordinary miner's lamps in their caps."

No page of the transcript is referred to, although immediately preceding a reference is made to paging as verification for other statements. After having carefully read all the testimony given, with a view of noting down the evidence on every material point, we do not remember of a single witness as having testified what kind of lamp there was in any of the caps of these three men when found after the accident, and no testimony was given to show what kind of lights they were using immediately before. The statement that they had the ordinary miner's lamps in their caps is, therefore, pure surmise.

The statement on page 19 that "the evidence conclusively establishes that the explosion was caused by the ignition of gas in room 8 of the fourth left entry of the

mine" is, in view of the evidence to the contrary, set out in our abstract, unwarrantable and untrue. Neither was there any evidence to justify the assertion, on page 20, that the boy was blown through the door a distance of over seventy feet; and the theory that the force of the explosion, when it came in contact with the body of water in the fourth left air course, caused it to rebound back into the fourth main entry and then down the same, is as novel as it is crude. If the boy was blown through the door, as claimed, it would be more apt to have been caused by the explosion of the kegs of powder in the fourth left main entryway, the force of which explosion would be felt down that entryway somewhat similar to the effect of powder exploding in a cannon.

The statement on page 20 that there is no conflict between the witnesses on the first proposition, that there was a body of water in the fourth left air course which extended within three inches of the top, is without justification in the evidence. The only testimony to that effect was "appearances of a water mark" some time after the explosion had taken place, and therefore more properly attributable to changes due to the explosion.

The third proposition on page 21, that "this body of water was allowed to accumulate because the appliances were not sufficient to take out all the coal produced, to keep the mine free from water," has not the support of a scintilla of evidence and is wholly unjustifiable. The appliances, on the contrary, were shown to be adequate and sufficient. It is difficult to understand why such unwarranted mis-statements should be made. Can it be possible that they imagine that if such mis-statements be made, a court will not examine the evidence but rest with the assertions that the evidence is sufficient to justify the

statements and, therefore, conclude that there was sufficient conflict in the evidence as to the facts established to make the case one for a jury? Such a result would, indeed, enable the uncandid to profit by their disingenuousness.

On page 67 the contention is made that because defendant in error asked the court to give certain hypothetical instructions somewhat based upon the plaintiff's theory as to the cause of the explosion, defendant must be held to admit that there was evidence sufficient to support this theory. Such an argument is puerile. Defendant's request for a peremptory instruction had been everruled. Very frequently the lawyer, out of an abundance of precaution, after the court has ruled against his views, asks instructions in view of his opponent's contention, although he may be satisfied in his own mind that such contention is wholly without foundation in the evidence.

BRIEF AND ARGUMENT.

I.

ONLY ERRORS OCCURRING AT THE TRIAL CAN BE CONSIDERED BY THIS COURT.

There are twenty-nine assignments of error made in this court, and there were eighteen assignments of error in the Supreme Court of the Territory. From the twenty-second to the twenty-ninth assignments, inclusive, findings or statements of the Territorial Supreme Court are questioned. Had we time it would afford us pleasure to demonstrate that they are all correct; but this court can only consider in an action at law errors committed by the *nisi prius* court, and in this case only the errors, if any, occurring at the trial. It could not even review, if such a case were presented, the action of the trial court in refusing to grant a new trial because of preponderance of the evidence one way or the other.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S., 242–246.

II.

AS THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY A RECOVERY IN FAVOR OF THE PLAINTIFF, THE DEFENDANT BEING ENTITLED TO A PEREMPTORY INSTRUCTION, NO PREJUDICIAL ERROR COULD HAVE BEEN COMMITTED OF WHICH PLAINTIFF CAN COMPLAIN, EITHER IN THE INSTRUCTIONS GIVEN OR, INDEED, IN THE RULINGS ON EVIDENCE.

It is very clear that if, under the evidence, the plaintiff was not entitled to recover, she could not have been prejudiced, in a legal way, by any instruction which was

given by the court, nor, indeed, by the admission or rejection of any evidence which did not tend to sustain or establish a right to recover. The court, when called upon, will therefore examine the entire record, as was done by the Supreme Court of the Territory, since all the evidence has been preserved, to see whether the plaintiff has been prejudiced by any ruling of the trial court.

West v. *Camden*, 135 U. S., 508.

We shall first show that under the evidence the plaintiff was not entitled to recover, and in conclusion shall examine the different errors assigned and show that they are without foundation.

III.

THE PLAINTIFF COULD NOT RECOVER UNDER THE EVIDENCE FOR THE FOLLOWING REASONS, ANY ONE OF WHICH IS CONCLUSIVE:

FIRST. IT WAS INCUMBENT ON PLAINTIFF TO SHOW BY THE EVIDENCE NOT ONLY THAT THERE WAS NEGLIGENCE IN SOME RESPECT OR PARTICULAR, BUT THAT THE ALLEGED NEGLIGENCE WAS THE DIRECT AND PROXIMATE CAUSE OF THE ACCIDENT. IF THE CAUSE OF THE ACCIDENT OR EXPLOSION IS A MATTER OF CONJECTURE OR SPECULATION, PLAINTIFF HAS FAILED IN HER PROOF. THE EVIDENCE DOES NOT SHOW THAT THE ALLEGED DEFECTIVE CONDITION OF THE AIR PASSAGE IN THE MINE, OR THE ACCUMULATION OF ANY EXPLOSIVE GAS AT ANY PLACE IN THE MINE, WAS THE PROXIMATE CAUSE OF THE ACCIDENT WHICH CAUSED THE DEATH OF PLAINTIFF'S INTESTATES.

It is clear from a review of the evidence that the cause of the explosion was unknown and is merely a matter of

speculation. To sustain the plaintiff's theory and contention it is necessary to assume and presume (*first*) that the fourth left air course was so obstructed by a body of water that a sufficient current of air did not pass through the same and into the rooms off the fourth left, including room 8, so as to carry out noxious gases if any in room 8. The evidence of plaintiff is based solely on the condition of this air course after a violent explosion had taken place, when it is but reasonable to assume that there was also a change in the conditions caused thereby. For the defense it was shown the ventilation and air current were ample and not affected by any obstruction. (*Second.*) Plaintiff must assume and presume that such a body of gas accumulated at the face of room 8 as to extend below the brattices—indeed down to the cross-cut where the men were found—and that this was due to a lack of air current; (*third*) that Donahue, the pit boss, had not caused this gas, if any, to be removed prior to the accident, but with knowledge of the same had sent two workmen, Flick and Kelly, into the room with naked lights to take up the track —the legal presumption being that Donahue had performed his duty, had used due care and had not given a negligent order;—(*fourth*) that Flick and Kelly, the workmen, or Donahue himself, had gone into room 8 with *naked lights*, and did not use safety lamps as required, as otherwise there would be no danger of explosion from the gas, if any; and that they had deliberately disregarded the well-known and plain danger of fire signals placed in this room, and ignited the gas by bringing a naked light in contact with same, which could not extend down to any of the signals if there was any air current at all; and that this caused the explosion. The burden of proof being upon the plaintiff, in the absence of

evidence, it is to be presumed that these danger signals would not be disregarded by the men and that they would not go in except with safety lamps; (*fifth*) that because two nights before the accident a little gas was found in the upper part of room 8 about ten feet from the face, but evidently not extending down to the brattice, gas continued to be given off in the meantime from some seam in that room, without exhausting such seam or reservoir containing the same, until such quantity of gas had accumulated and filled the upper part of the room down to the cross-cut and below the brattice. This assumes that there was such a seam or reservoir containing a sufficient quantity of gas to fill the room to that extent, and also that there was no air current passing through that room. When examined by the coroner's jury the room was not making gas, apparently.

If there was an air current—and all the evidence is to the effect that there was, and that the alleged water in the fourth left back air course did not obstruct it—then at least the gas could not have extended below the end of the brattice in room 8, as any air current would at least have carried out the gas extending to the end of the brattice. Does plaintiff claim that the men went up to this gas and ignited it? If so, she would have to say that they were knocked back to the cross cut where found, a distance of from eighty-five to ninety feet. This would not be plausible. Does plaintiff contend there was no air current, and that therefore the gas extended down to the cross-cut and the men ignited such gas about the place they were found? If so, how was it the men were able to take up the track in the room opposite and in the vicinity of the last cross-cut? Would not the explosion have occurred immediately when they went into the room

at this cross-cut, and certainly before any track was taken up opposite the cross-cut, and in this room? If these men commenced to take up the track beginning at the neck or mouth of the room, then they necessarily passed by the danger signal placed by Ray across the track below the cross-cut. If they commenced taking up this track at the upper end they would have passed over the danger signal placed by Ray on the track ten feet above the cross-cut, and then if it was a gas explosion in this room, it should have occurred before the track was taken up down to the cross-cut. The burden was on plaintiff to show just what was done. But the air current was good. Plaintiff's theory is not consistent with the facts.

Again, the only rational view is that if there was an explosion of gas in room 8, and that was the origin, we would find in that room the greatest effects thereof afterwards. The truth is, the greatest effects were found in and about rooms 16 and 17, where powder was found to have been exploded; and the rational theory is, that as the men would be handling their powder about the time of the explosion some of the men, either accidentally or negligently, started a powder explosion in that neighborhood, or it was started there by some miner in having struck a seam of gas and igniting it with his light.

The court will at this day take judicial notice of physical laws in considering the evidence.

It is elementary that in an ordinary case of negligence one of the chains in the plaintiff's proof necessary to be established is that the alleged negligence was the proximate cause of the injury, and this must be established.

Shearman and Redfield on Negligence (4th Ed.), Sec. 25.

In the Nitro-glycerine case, 15 Wall., on page 537, Mr Justice FIELD said:

"A party charging negligence as a ground of action must prove it. He must show that the defendant by his act or by his omission has violated some duty incumbent upon him, which has caused the injury complained of."

Ordinarily the connection between cause and effect is easily established, and no question arises; but mere negligence never becomes actionable until it is shown by the proof to be the cause of the injury.

In cases of carrier and passenger, where a passenger is injured, it is sometimes presumed to have been caused by the negligence of the carrier, because the carrier undertakes for pay to transport the passenger safely, and the very fact that the passenger is not transported safely in many cases raises a presumption of neglect of duty, as where the injury could only have occurred by reason of something occuring within the control of the carrier.

But this is not always true. See the often approved case of *Daniel* v. *Met. Ry. Co.*, L. R., 3 C. P., 216-222, approved in Exch. Chamber, L. R., 3 C. P., 591.

In *Spencer* v. *C. M. & St. P. Ry. Co.*, 81 N. W., 407, it was held by the Supreme Court of Wisconsin, in January, 1900. where a stream of water entered a car window injuring a passenger, that the verdict could not rest on speculation. guess or conjecture; and evidence of the accident was not sufficient to raise a presumption of negligence; that you could not found a conjecture on a conjecture; or as this and other courts have stated, you cannot base a presumption on a persumption.

United States v. *Ross*, 92 U. S., 281.
Douglas v. *Mitchell*, 35 Pa. St., 440.

In some cases, also, where one not in contractual relation with another is injured through a cause which appears to be within the control of that other, as where a person walking along a street is injured by something falling out of a window, as such things do not usually occur except through some fault, there is a presumption of negligence connected with the accident; but in the majority of cases, as between strangers, there is no presumption of negligence.

Where, however, a servant is injured through the alleged negligence of the master, inasmuch as the servant is paid to take risks incident to the manner in which the business is conducted or as he may know it to be conducted, there can be no presumption in his favor that the injury which he suffers was occasioned by the default of the master or that the master was negligent—that is, did not discharge his duty—the presumption being the other way.

The reasons are set out in the well-considered case of the *Atchison, T. & S. F. R. Co.* v. *Wagner*, 33 Kas., 660; approved in *Atchison, T. & S. F. R. Co.* v. *Ledbetter*, 34 Kas., 326. And see *Flippin* v. *Kimball*, 31 C. C. A., 285.

In a case of this nature, therefore, the burden is upon the plaintiff, not only to show that there was some negligence, but in order to make this negligence actionable or culpable it must be shown that such negligence was the cause—indeed, the direct and proximate cause—of the injury. It is said that a mere conjecture, built upon a bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another; and this rule should certainly have its full force and effect where the presumptions, if any, are against the

plaintiff. While it is true that inferences may be drawn from the testimony, yet if the inference to be drawn is one necessary to establish an essential link in the chain of proof, it is manifest that the inference so to be drawn must be the only rational and fair one which may be drawn from the evidence. The burden being upon the plaintiff, therefore, where it appears that the cause of the injury is conjectural, it is clear that the plaintiff has failed in her proof; for it is well settled in a case of this nature that if two different inferences or conjectures may be drawn from the evidence, which is undisputed, the one having a tendency to show a liability and the other having a tendency equally strong to show there was no liability, the defendant is entitled to the presumption and inference in its favor. Liabilities are not imposed upon parties upon mere conjecture or speculation. The party seeking to recover damages must show that under the law and the evidence he is entitled to recover.

In *Hughes* v. *C., N. O. & T. P. R. Co.*, 91 Ky., 526; s. c., 16 S. W., 275, the action was to recover on account of the death of a brakeman. In descending a steep grade the train passed through four tunnels. He was last seen just before entering the first, and, after the train had passed all, was found lying on his back on the top of an unusually high foreign car. The back of his head had been crushed by striking some object He had passed over five cars since last seen. A brakeman could not pass the last tunnel while standing upon an ordinary car, nor the preceding tunnel on such a car as the one on which he was found. One of the crew saw the tunnel gang at work in the last preceding tunnel and noticed a new timber hanging by a rope. A verdict was directed for the defendant, which was affirmed. It did not ap-

pear whether he was injured by the low tunnel or the timber hanging down in the other one. The court said:

"One suing to recover damages for injury arising from another's neglect must offer some testimony conducing to show that it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way. It cannot be found without evidence. The complaining party must not only show an injury, but also some evidence tending to show that the other party is to blame for it. * * * *Circumstances are merely presented upon which one may theorize as to the cause of the accident.* The burden of showing neglect rests upon the complainant, and under such circumstances he has offered no evidence tending to show it. *He has merely presented two or more states of case upon which one may theorize as to the cause of the accident.*"

In *Pennsylvania R. R. Co.* v. *Schertle*, 97 Pa. St., 450; s. c., 2 A. & E. R. Cas., 158, a brakeman was injured while attempting to couple a car to the tender of an engine, because, as alleged, the steps were imperfect in number and construction, and the spaces between the ties and sills were unfilled, so that the road-bed was rough and uneven and full of pits and hollows. The court said:

"As to how he fell, or the cause of his falling, there is not a word of evidence. The theory of the plaintiffs was that his fall was occasioned either by reason of the roughness or inequalities of the track or in an attempt to get on the tank; the allegation being that the step was defective, and that he missed his footing because of such defect. It appears from the evidence that the track at the particular point where the accident occurred was in the course of being repaired; that it had been raised a few inches, and the space between the ties had not been ballasted or filled in. * * * There was not, however, as before stated, a particle of proof that either the track or the step had anything to do with his death. * * * *The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or almost mere possibilities. This will not do.*"

In *Hughes* v. *Oregon Improvement Company*, 20 Wash., 294; s. c., 55 Pac., 119, the injury was caused by fire breaking out in a mine. The cause was apparently unknown. The court said:

"But it is claimed by the respondents that it was negligence on the part of appellant to permit the fire to break out in the mine. We think, however, that they are mistaken in that regard. All that the proofs show is that the fire was discovered in a place where it could have been least expected, and which was carefully inspected the evening before. The origin of the fire is unknown, but the testimony of all the witnesses who testified upon the point, if true, shows that it was not the result of spontaneous combustion, or of any act imputable to the appellant. The mere fact that the fire occurred is not, in itself, proof of negligence. Bailey, Mast. Liab., p. 508; *Kuhns* v. *Railway Co.* (Iowa), 31 N. W., 868."

In *Southern Pacific R. Co.* v. *Johnson*, 16 C. C. A., 317 (C. C. A., 9th Circuit), it appeared that an engineer in the employ of the defendant was running an old and nearly worn-out engine liable to jump and sway. While running eighteen miles an hour he went out on a running board to close an injector valve which had stuck. He closed the valve, started to return, and while returning fell from the engine. The court said:

"There is an entire absence of evidence as to how Johnson fell from the engine, and the cause of his fall is involved in uncertainty and doubt. *That he was thrown from the running board by reason of the jarring of the locomotive is not the only and exclusive inference that the evidence is susceptible of*, as counsel for defendant in error contends. If it were the only reasonable inference that could be drawn, it might then well be said that the question should have been submitted to the jury to abide by their judgment and verdict. * * * *The general rule being that negligence cannot be presumed from the fact of the injury, though it may be inferred from the facts proved, it obviously cannot be based on guesses or conjecture.*"

In *Short* v. *Railroad Company*, 69 Miss., 828; s. c., 13 Sou., 826, it was said:

"The deceased was killed, and no one knows how. That is not enough to subject the railroad company to liability. Negligence must be shown."

In *Louisville Gas Co.* v. *Kaufman et al.* (1898), 48 S. W., 434, it was held that where it is just as probable that the injury was the result of one cause for which the defendant would not be liable, as of another for which he would be liable, the plaintiff cannot recover.

This rule was also applied in *Grant* v. *Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 658; s. c., 31 N. E., 220.

In *Manning* v. *Chicago & W. M. R. Co.*, 105 Mich., 260; s. c., 63 N. W., 312, it was claimed that the death of a brakeman was caused by reason of striking a tree which stood about eighteen inches from the side of the car. His cap was found near this tree, and the left side of his face, which might have been struck by it, was found bruised, and he was found run over a short distance from this tree. In the opinion it is said:

"*We think the cause of the fall from the train was purely conjectural.* * * * Whether he slipped on the gravel, fell in stepping from one car to another, or how or by what means he fell or was thrown off, is not shown. His face was as likely to be bruised by the fall as by striking against the tree. * * * If the jury could draw this conclusion from the evidence proved, they could as well draw the conclusion that the deceased in walking over the sand on the car slipped and fell, or in passing from one car to the next he fell between them."

In *Sorenson* v. *Menasha, P. & P. Co.*, 56 Wis., 338; s. c., 14 N. W., 446, it was said:

"Judicial determinations must rest upon facts, and legal liability must be determined by the law in application to facts."

In that case the intestate, an employe of defendant, was found bruised and dead in a hole which had been cut in the floor of defendant's mill and in which was water about six feet deep. Upon all the evidence it was held that there were no facts from which the question of negligence as causing the accident could be determined.

In *Chandler* v. *N. Y., N. H. & H. R. Co.*, 159 Mass., 589; s. c., 35 N. E., 89, it is said, with reference to such a case:

"There is an entire absence of evidence as to how intestate happened to fall to the ground, and *it is not enough to show that one conjecture is more probable than another.*"

In *Carruthers* v. *Chicago, R. I. & P. Ry. Co.*, 55 Kas., 601; s. c., 40 Pac., 915, deceased was last seen on top of a freight train, and while the train was crossing a bridge he uttered a cry of distress, which was heard by the brakeman. The train was stopped and he was found run over, lying across the west rail. The iron rods used for a hand-hold in going down the ladder were loose on one car. On the flange of the wheel of this car were found a clot of blood, a piece of flesh and a little fuzz or a piece of woolen cloth corresponding with the material in the coat and vest worn by the deceased. A verdict was directed for the defendant, and affirmed. The court said, referring with approval to an Iowa case:

"A theory cannot be said to be established by circumstantial evidence, even in a civil case, unless the facts relied on are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them, and that it is not sufficient that they are consistent merely with that theory."

In *Smith* v. *C., M. & St. P. R. Co.*, 42 Wis., 520, the court said:

"The respondent's liability depending upon the carelessness or fault of its agents, employes or managers in some way, and the appellant's right to recover depending upon the same being clearly shown by the evidence, and it being his duty to furnish such evidence, it was certainly incumbent upon him to show *how and why the accident occurred.*"

In *Donald* v. *C. B. & Q. R. Co.* (1895), 93 Iowa, 284—s. c., 61 N. W., 971, it was claimed deceased fell from a train by being struck by a bridge. His body was found near to and a little east of it, and the train was going east. But the court held there could be no recovery because the cause of his fall was a mere matter of conjecture.

The same was held, under substantially the same facts, in *Borden* v. *D. L. & W. R. Co.*, 131 N. Y., 671; s c., 30 N. E., 586.

In *Wintuska's Adm'r* v. *Louisville & N. R. Co.*, 20 S. W., 819 (Ky.), it was alleged that deceased was knocked from a train by a ledge of rock which was too near the track. No one knew of the accident until the train had proceeded several miles. He was last seen on a car going to a flat car, to reach which he would have to descend a ladder on the side towards the ledge. The only wound was upon his right side, which corresponded with the ladder and ledge. His body was found in a cut where the ledge of rock projected. HOLT, C. J., said:

"It seems to us, however, that all this is mere speculation. Why not as well suppose that the deceased never came in contact with the ledge, but became dizzy or slipped in the darkness as he walked along the top of the car and fell off, the wound upon his head being caused by coming in contact with some hard substance as he struck the ground."

To the same effect see

Tyndale v. *Old Colony R. Co.*, 156 Mass., 503; s. c., 31 N. E., 655.

Chandler v. *N. Y., N. H. & H. R. Co.*, 159 Mass., 589; s. c., 35 N. E., 89.

Cotton v. *Wood*, 8 C. B. (N. S.), 568.

Phil. C. & P. R. v. *Henrice*, 92 Pa. St., 431.

B. & P. R. Co. v. *State*, 75 Md., 152; s. c., 23 Atl., 310.

Wheelan v. *C. M. & St. P. R. Co.*, 85 Ia., 176; s. c., 52 N. W. 119.

In *Geoghegan* v. *Atlas Steamship Co.* 146 N. Y., 369, s. c., 40 N. E., 506, it is said:

"There is no direct proof as to how the deceased met his death. There is nothing to show that he fell through the open port or that his exit from the ship was accidental. It is true a theory may be adopted which would lead to the moral conviction that his death was accidental while in the discharge of his duty and in the exercise of reasonable care, but all this falls very far short of sustaining the burden of proof under which the plaintiff rested."

In *Orth* v. *St. P. M. & M. R. Co.*, 47 Minn., 384; s. c., 50 N. W., 363, it is said:

"The burden of proof was upon the plaintiff to establish his contention; and 'proof' is logically defined as a sufficient reason for assenting to a proposition. * * * *It is not even enough that the evidence leaves the matter in equilibrio as to whether the injury was produced by a cause for which the defendant was responsible, or by one for which it was not responsible;* and *a fortiori*, no recovery can be had if it is more probable that it was produced by the latter."

So in *Quincy Mining Co.* v. *Kitts*, 42 Mich., 34, Judge COOLEY said:

"It may be guessed or surmised that there was negli-

gence somewhere, and one juror may guess that it was in a want of careful selection of timber, another that it was in a want of subsequent inspection or a want of care to prevent rocks falling on the bridge; but *the case affords no safe grounds for anything beyond conjecture; and if the master can be held liable under the circumstances which the record discloses, on mere guesses or inferences respecting the existence of fault somewhere, the rule that an employe assumes the ordinary risks of his employment will be wholly done away with.*"

The foregoing rule was applied by this court in *Railroad Company* v. *Houston*, 95 U. S., 702, for Mr. Justice FIELD concludes:

"Not even a plausible pretext for the verdict can be suggested unless we wander from the evidence into the region of conjecture and speculation."

A number of other authorities might be cited to the same effect, but it is sufficient to simply call attention to the rule in this court, as announced in *Bowditch* v. *Boston*, 101 U. S., 18, in which Mr. Justice SWAYNE said:

"In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon which the *onus* of proof is imposed."

He also says:

"It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice."

Southern Pacific Co. v. *Pool*, 160 U. S., 430, 440.

Two witnesses for the plaintiff, Alexander and Leaden, with nothing more than the qualification of ordinary miners, pretended to give their opinion, or rather surmise, as to the cause of the explosion, each stating that in his opinion it was caused by the ignition of a body of gas in room 8, and one of them stating that the supposed accumulation was caused by the air course in the back entry being obstructed. This is a new method of supplying deficiency in the evidence as to facts. Instead of reasoning from cause to effect the process is reversed. Whether the air course was obstructed or not was not a subject for expert testimony. It was an actual fact which required proof. This is also true as to whether there was any gas or any such body of gas in room 8 as was assumed by these witnesses. The cause of the explosion was an essential fact to be determined by the jury, if there was sufficient evidence on the point. It is not the function of expert witnesses to supply missing testimony, or supplant the evidence given, because it may be unfavorable, and establish this essential issue by their opinions.

These witnesses were not even present at the time the accident occurred, and the cause of the accident, therefore, could be determined by the jury, when the facts were disclosed, as well as by these witnesses. That plaintiff did not choose to use available witnesses to testify as to the air current or other matters is no reason for permitting her to substitute as proof of these facts improper conclusions or surmises in the way of opinions not rising to the dignity of evidence.

Maitland v. *Gilbert Paper Co.*, 97 Wis., 476; s. c., 72 N. W., 1024, 1027.

Briggs v. *Minneapolis Street Ry. Co.*, 52 Minn., 36; s. c., 53 N. W., 1019, 1020.

Milwaukee & St. Paul Ry. Co. v. *Kellogg*, 94 U. S., 469.

The New England Glass Co. v. *Lovell and others*, 7 Cush., 319.

Hoyt v. *Long Island Ry. Co.*, 57 N. Y., 678.

Van Zant v. *Mut. Ben. Ins. Co.*, 55 N. Y., 169.

Hughes v. *County of Muscatine*, 44 Ia., 672.

T., P. & W. R. W. Co. v. *Conroy*, 68 Ill., 560.

Roberts v. *C. & G. T. Ry. Co.*, 78 Ill. App., 527, 531.

Chicago R. I. & P. Ry. Co. v. *Sheldon*, 51 Pac., 809.

U. S. Mail Line Co. v. *Carrollton Furniture Mfg. Co.*, 12 S. W., 342.

Chicago & E. I. Ry. v. *Ross et. al.*, 56 N. E., 451.

If the explosion were caused by the ignition of fire damp in room 8, the greatest effects thereof would be found in that room. If caused by an explosion of powder and ignition of coal dust in room 16 or 17 or thereabouts, the greatest effects would be seen in the neigborhood of these rooms, and the flame would travel not only down the entryway, but through the upper cross-cuts which lead from one room to the other, and so along the opened traveled way of the inspectors along the air current or course. One of these witnesses gravely says the ex-

plosion would fly against the air current, and therefore from room 8 in the direction of room 1 through the upper cross-cuts in a zig-zag course; and in the same breath he asserts that the gas could only accumulate by reason of the air course being obstructed, so that there would be no air current to carry the gas out, above the brattice at least. The process of reasoning adopted by the one witness to come to this conclusion is somewhat as follows: the explosion occurred in room 8 because he assumes that gas was permitted to accumulate there on account of an obstruction in the air course in the fourth left, thus not affording a sufficient air current to take the same out. Then he again assumes that the fourth left air course was obstructed so that a sufficient current of air was not afforded, and thereby gas was permitted to accumulate in room 8. So he reasons in a circle. He ignores the fact of there necessarily being air in the lower part of room 8, for if the gas extended below the cross-cut leading into room 9 an explosion would have occurred the moment the men entered that cross-cut, and before they were able to take up any track at all.

At Blanzy, in France, several fatal explosions have been traced to the firing of coal dust from the flame of a shot, even in a case where no fire damp was present in the workings.

See Enc. Brit. (9th Ed.), American Revision, Vol. 6, page 73.

The fire-damp of miners is known as marsh gas or carburetted hydrogen. When mixed with from four to twelve times its volume of air, it is explosive; but is not explosive when above or below that percentage. In the latter case, when light is brought in contact with the same, it is only inflammable, burning brightly.

Enc. Brit. (9th Ed.), Am. Rev., Vol. 6, p. 72.

The so-called spontaneous combustion in coal mines which sometimes takes place is due to rapid oxidization set up when finely divided coal is brought in contact with air.

Enc. Brit. (9th Ed.), Am Rev., Vol. 6, p. 74.

So if there was a proper admixture of air in room 8, in the volumes above given, and an explosion occurred in that room, the effects would have been felt mainly throughout that room, and the main effects would not have been found in room 16 or 17, after a tortuous passage which the flame would necessarily have to go through had the explosion occurred in room 8.

An intelligent judge could therefore not be expected to pay any attention to the opinion of these two witnesses for plaintiff as to the cause of the accident. The court must determine whether this cause has been established by evidence and not surmise.

SECOND. NEGLIGENCE AS THE CAUSE OF THE ACCIDENT WAS NOT SHOWN ON THE PART OF SUPERINTENDENT DUGGAN. DONAHUE, THE DAY PIT BOSS, AND THE OTHER WORKMEN IN THE MINE—INDEED, INCLUDING THE FIRE BOSSES—WERE FELLOW-SERVANTS OF THE DECEASED. THEY WERE ALL ENGAGED IN CO-OPERATING TOGETHER IN THE OPERATION OF THE MINE; SO THAT DECEASED MUST HAVE UNDERSTOOD THAT IN PERFORMING THEIR WORK THEY WERE LIABLE TO BE INJURED THROUGH THE NEGLIGENCE OF THE OTHER WORKMEN CARRYING ON THE GENERAL UNDERTAKING, AND THEY THEREFORE ASSUMED THE RISK OF BEING INJURED THROUGH THE NEGLIGENCE OF SUCH OTHER WORKMEN, THAT BEING A MATTER AGAINST WHICH THE EMPLOYER DID NOT UNDERTAKE TO INDEMNIFY THEM.

Plaintiff contended before the Territorial Supreme Court that Flick and Kelly—and indeed, Donahue—went into room 8 through the cross-cut from room 9, in order to take up the track in room 8; and that the gas was ignited by naked lights used by them—the gas, it was contended, being suffered to accumulate by reason of an insufficient air current caused by an assumed obstruction of water in the fourth left air-course. This assumes on their part that after Donahue was notified of there being gas at the face of room 8, he himself went in with the other men or directed them to go in with naked lights (when they might have used safety lamps), and that they disregarded or walked over the danger signals and thus came in contact with the gas and ignited the same. It appeared, however, that at the time of the explosion a portion of the track above this last cross-cut had already been taken up and the tools for taking it up were at hand, presumably being used. If plaintiff's theory be correct, the explosion ought to have occurred before the men succeeded in taking up any of the track in that locality, and if the air current was so poor that it would not remove the gas from this room and the gas was still accumulating, as is claimed, it would have extended down to this cross-cut and be ignited immediately on the men entering room 8 through the same.

However, assuming that the explosion was so caused, the company had used means to notify all parties of the presence of gas in this room sufficient for the purposes, as the room was not being then worked by the miners and the method adopted was well known to the deceased. So that there would be no culpable negligence attributable to the company in respect to gas in room 8, so far as the deceased were concerned. And as Donahue, Flick and

Kelly, according to plaintiff's theory, were working in the mine in removing the track, they were engaged in performing the duties of ordinary fellow workmen, and if they or any of them were negligent it would be the negligence of fellow workmen. Indeed, we may go further. As the condition of the mine was changing from time to time and as it was necessary that the fire bosses should do work in extending brattices in view of the changing conditions, they were simply co-operating in the general work of operating this mine.

FELLOW SERVANTS AND RISKS ASSUMED BY SERVANT.

The relation between the parties being contractual, it is plain that the servant's action must be based upon the assumption that the master has agreed to indemnify the servant against the injury sustained; that is, the master has guaranteed that the servant would not be injured by the causes complained of. Is this assumption sound—the master himself not being personally to blame?

As the decisions on the liability of the master to the servant injured in his employment, and the doctrine of fellow servants, are so conflicting and irreconcilable (it being held by one court, but only one, that it is always a question for the jury to determnine whether two workmen are fellow servants or not), it would seem that one would arrive at a more rational conclusion by examining a few of the leading cases in which the question of liability was first discussed. Some courts seem to be influenced rather by the fact that the master is more likely to be able to respond pecuniarily for the damage than the fellow servant causing the injury, than by the reasons or principles upon which the liability is to be rationally founded.

Prior to 1837 no precedent could be found which held the master liable to the servant injured while in his employ, and the first cases distinctly announced non-liability. The leading case, as is well known, is *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Metc., 49, in which Chief Justice Shaw, with his usual clearness of expression, first set forth the reasons which, when once stated, were apparent to everyone, because they were based upon the nature of the relation of the parties. At the outset he showed that the relation was necessarily one of contract, in which the servant was paid to assist in the undertaking of the master, and the respective duties and obligations were therefore to be determined by what might be fairly implied from such a contract. The case was therefore entirely different from that in which a stranger received injury through the neglect of a servant while engaged in the business of his master. He says:

"The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents is assuming the very point that remains to be proved."

He then proceeds to show that there can be no differ-

ence whether the servants are in the same department of duty or not. He says:

"When the object to be accomplished is one and the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty. It would vary with the circumstances of every case. * * * Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because *the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself*, and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant."

He concludes with a caution that there may be implied warranties in the undertaking, such as the goodness and sufficiency of machinery used; but as such question was not in the case it was not decided.

The next case worthy of consideration is the often approved one of *Bartonshill Coal Company* v. *Reid*, 3 MacQueen 266, in the House of Lords, which was heard by Lord Chancellor Cranworth in June, 1856, but which he had under consideration for two years; in the meantime

the Maguire case having been argued before him and his successor, Lord Chancellor Chelmsford, and Lords Brougham and Wensleydale. The case was not altogether dependent upon English law, but rather involved the application of general principles, since it involved for the first time an administration of the Scotch law on the subject, and was therefore considered from an original standpoint. Chief Justice Shaw's judgment in the Farwell case was referred to with approval, and was appended as a note to the case. There, a miner while being drawn up a shaft was killed through the negligence of the engineer operating the engine which drew up the cage. However, Lord Cranworth immediately stated:

"With reference to the law of England, I think it has been completely settled that in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous), the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed."

The views which he finally expressed were concurred in by the judges who presided in the Maguire case.

Lord Cranworth first considered the case of injuries to strangers and used the following argument:

"When an injury is occasioned to anyone by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own accouut, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In

such a case the maxim '*respondeat superior*' prevails, and the master is responsible. Thus, if a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a gamekeeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by: in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master. *Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself, or of those acting under his orders, in the course of his business. Third persons cannot, or, at all events, may not, know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say: 'I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence.' A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom, or by whose orders, these risks are incurred responsible to third persons for any ill consequences resulting from want of due skill or caution."

Having made this practical exposition, he continued, on page 284:

"But do the same principles apply to the case of a

workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; *he knows*, if such be the nature of the risk, *that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him.* If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken."

This, it will be seen, is an elaboration of Chief Justice Shaw's views. As one man has no control over another so as to prevent him from being negligent at some time or another, it is therefore not reasonable for a servant to assume that the master guarantees that another servant will not be negligent. The servant, therefore, understands that as he has no such guarantee, and is paid to do the work, he necessarily is to take or assume the risk (as between himself and his employer) of being injured by some other servant who is also performing or carrying on the work of the master. He, of course, has the right to assume that the master will in the first instance (that being presumably the master's act) employ competent fellow workmen, for it would be wrong for the master, without the servant's knowledge, to surround him with other workmen whom the master knew to be incompetent. So, as the servant understands that the master cannot and does not guarantee that another servant may not at some time be negligent in the performance of his work, which may injure him, and that the master does not therefore undertake to indemnify him against such injury or such

risk, it is clear that it can make no difference in what grade of service, whether superior or not, the servant doing the injury may be, nor indeed what act he may be doing, if it is one which the other servant understands is necessary for the operation of the work of the master in which he also is engaged.

This was demonstrated in the often cited case of *Wilson* v. *Merry and Cunningham*, L. R. 1 Scotch App., 327, decided in 1868 in the House of Lords, before Lord Chancellor Cairns, Lords Colonsay, Cranworth and Chelmsford. There it appeared that respondents operated a coal pit sunk to a depth of ninety fathoms, containing four seams of coal. In order to open and work one of the seams from the side of the pit, a scaffold was erected in the pit from which to drive the level in the same. The scaffold was completed Saturday, November 21st. On the following Monday, the 23d, Robert and Henry Wilson, sons of appellant, were engaged to assist in driving the level, and on the 24th went to work. The system of ventilation in the pit before the scaffold was placed there was of the usual kind by downcast and upcast, and it was not suggested that before the platform was erected the system of ventilation was deficient in any particular. The platform interrupted the free current or circulation of air in the pit, and although apertures were left in the platform on the upcast side for the return of the air from the shaft below, yet an accumulation of fire-damp appears to have taken place underneath the platform, and on November 25th, while Henry Wilson was searching on the scaffold with a light for a wedge which was missing, the light came in contact with fire-damp coming from beneath the scaffold, and an explosion took place by which the scaf-

fold was blown up and Henry Wilson killed. No personal fault or negligence was imputed to the respondents. The general manager of their works in Lanarkshire was Mr. Jack. The manager of the coal pit, underneath Jack, was John Neish. Subordinate to Neish was a man named Bryce, who attended to the underground operations. One Robson, formerly a mining engineer, was a partner with respondents, and it was under the general direction of respondents and Robson and Jack that the working of the particular seam was commenced. The charge of sinking the pit and making arrangements for working it was given to Neish. It was proved that Jack and Neish were competent, and they were furnished by respondents with all necessary materials and resources for working in the best manner. A verdict for appellant, £100 damages, was reversed, it being held that Neish and Bryce, in erecting the platform, were to be regarded as fellow-servants with the deceased, and for their neglect, if any, in so obstructing the ventilation the respondents could not be held liable.

In his opinion the Lord Chancellor quotes with approval the language of Lord Cranworth in the Reid case, heretofore set out. On page 332 he says:

"The master is not, and cannot be, liable to the servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. *But what the master is, in my opinion,*

bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant* v. *Webb*, negligence cannot exist if the master does his best to employ competent persons; *he cannot warrant the competency of his servants.*"

On page 333 he continues:

"I think the learned judge ought to have told the jury that if they were of the opinion that the respondents exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work the respondents were not liable to the appellant for the consequences of the accident."

The opinion of Lord Cranworth is also worthy of perusal: Of the respondents, the operators of the mine, he says:

"They discharged their duty when they procured the services of a competent underground manager; and whether Wilson began to work with or under Neish before or after he had prepared the scaffold was a matter of no importance. * * * I have no difficulty in saying that he (the judge) ought to have charged the jury to the effect that Neish and the deceased were, according to the evidence, fellow-workmen, and that the defenders were not liable if they (the jury) were of opinion that Neish was a properly skilled workman to act as underground manager, even if there were defects in the scaffolding which caused the accident."

Lord Chelmsford said, on page 336:

"In the course of working the Haughhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow workmen, it would have been one of the risks incident to the employment in which the deceased was engaged. * * *

If the platform in the Pyotshaw seam was originally of improper construction for the purpose of ventilation, there was undoubtedly a complete act of negligence on the part of Neish at the moment of its erection. But as he was bound to take care that sufficient ventilation was maintained during the whole time of the workings, as long as he omitted to do so he was guilty of negligence, which continued down to the time of the occurrence of the accident."

Lord Colonsay, among other things, said:

"On the other hand, there are risks incident to occupations more or less hazardous, and of which the laborer who engages in any such occupation takes his chance. It is eminently so in regard to mining operations. There are perils of the pit as well as of the other deep, and one of those perils is the risk of the consequences that may, even in the best regulated pits, result from the carelessness or recklessness of one or more of those persons composing the organized body engaged in working the mine. The master does not impliedly insure the workman against such perils."

The foregoing reasoning is sometimes lost sight of, even by some of the English judges, and the maxim, "*Volenti non fit injuria*," is applied, as in *Thomas* v. *Quartermaine*, L. R., 18 Q. B., 685, wherein Bowen and Frey, L. J. J., held that under the employers' liability

act this maxim had not been affected and was still applicable to show that the servant assumed the risk of dangers apparent from the use of appliances claimed to be defective and the manner in which the business was conducted; and that in such case there was no evidence of negligence arising from breach of duty on the part of the defendant towards the plaintiff because of a knowledge of the danger.

The maxim was also applied by Lord Bramwell in *Membery* v. *Great Western Ry. Co.*, L. R., 14 App. Cas., 179.

While no doubt that maxim may be applied as far as it goes, as it is of general application, yet it is manifest it does not go far enough in this class of cases. It would be pertinent where the relation of master and servant did not exist, as in the case of *Woodley* v. *Metropolitan District Ry. Co.*, L. R., 2 Exch. Div., 384, where the servant of a contractor who had undertaken to do some work in a tunnel was injured by a train, he claiming that there was negligence on the part of the railway company in failing to use proper precautions and signals to notify him; but it was held that as he had worked there for some little time and had become acquainted with the manner in which the trains were operated, he voluntarily assumed the risks of the danger.

The principle to be deduced is that the servant may only assume that the master will use reasonable care and caution in the selection of other competent and fit workmen, and that he will furnish reasonably suitable materials and resources to those workmen to enable them to accomplish the work in a reasonably safe way. Therefore, the servant himself assumes all risks of injury caused by the negligence of fellow servants.

This court has, therefore, except in the *Ross* case, since overruled, logically followed the conclusion that difference in the grade of service makes no difference as to the non-liability of the master; as in *Alaska Mining Co.* v. *Whelan*, 168 U. S. 86, the foreman of a mine was held to be the fellow servant of a miner; and in other cases foremen and bosses of gangs of men have been held to be fellow servants of the men under them, the authorities being referred to and reviewed in the recent case of *New England Railroad Company* v. *Conroy*, decided December 4, 1899, by this court, 20 Sup. Ct. Rep., 85.

See, also,

Grady v. *Southern Ry. Co.*, 34 C. C. A., 494.

In *Hall* v. *Johnson*, 3 H. & C., 589, an "underlooker" appointed under a statute, and whose duty it was to superintend the mining operations, was held to be a fellow servant of a miner injured through his negligence.

The master of a ship and a seaman:

Olson v. *Oregon C. & N. Co.*, 96 Fed., 109.

See

What Cheer Coal Co. v. *Johnson*, 56 Fed., 810.

So Donahue was not the mine superintendent, and if he was doing what is presumed by plaintiff, he was simply performing the work of a fellow servant.

The true test is to determine the character of the act which was being performed. If the servant causing the injury, no matter how high his grade or position, was negligently performing an act which was necessary to

carry on the work in which they were all engaged, he would simply be performing the work of a fellow servant.

Thus, the New York cases say that where the one servant is performing a matter of detail necessary in carrying on the business, he is performing simply the act of a fellow servant, and must be regarded as such.

Golden v. *Seighardt*, 53 N. Y. Suppl., 460.
Loughlin v. *State*, 105 N. Y., 159.

Out of the foregoing rule have arisen those cases holding in general terms that it is the duty of a master to use reasonable care in respect to the reasonable safety of the place which he *furnishes* for the servant in which to perform his work, but, as will be shown, this can only have application to those cases where the servant understands that the place is one already *furnished as a permanent place for work*, and is not one which is to be furnished or made safe by some other workman co-operating to accomplish the ultimate work or design of the master. Where the servant is set to work in a factory he may assume that his employer has furnished that factory, and, therefore, his working place, and that his employer (as the act of furnishing the working place is assumed to be his act) has seen to it that it is reasonably safe for the purposes. But the servant cannot indulge in any such assumption where, from the very nature of his surroundings and the character of his work, he knows that the condition of his working place is changing from time to time, not only by his own work, but by the work of other servants. In such case he, therefore, necessarily understands that his safety is, in a measure, dependent upon the degree of care used by his fellow workmen. It is, therefore, well settled, for, indeed, it was the basis

of the opinion in the Wilson case, *supra*, that, especially in the case of mining, where the conditions of the working places are changing, the rule in respect to a safe place has no application, and the master discharges his duty where he furnishes the necessary appliances and instrumentalities to render it reasonably safe, and uses reasonable care to provide competent workmen to assist.

This is the basis of the decision of this court in *Armour* v. *Hahn*, 111 U. S., 313, where a workman engaged in the erection of a building was injured by reason of the defective construction of a scaffold. It was held the master was not liable. The question of liability for the negligence of a foreman was not in that case, but has since been decided in favor of the master by this court in other cases.

In *Quebec Steamship Company* v. *Merchant*, 133 U. S., 375, it appeared that the stewardess of a steam vessel coming on deck to throw the contents of a pail over the side of the vessel at a gangway, leaned over the railing, composed of four horizontal rods, which gave way because not properly secured. She fell into the water and was injured. The rods were movable, to make a gangway, and had been recently opened to take off some baggage of passengers, and not properly replaced. The porter and the carpenter had attempted to replace them, but left the work, knowing that it was unfinished. The ship's crew were divided into three departments—the deck department, containing the first and second officers, the purser, the carpenter and the sailors; the engineer's department, containing the engineers, the firemen and the coal-passers; and the steward's department, containing the steward, the waiters, the cooks, the porter and the stewardess. It was held that

the porter and the carpenter were fellow-servants with the plaintiff, and the corporation was not liable. Here, on account of the negligence of the carpenter, the place was rendered unsafe to the stewardess.

So, in *Hudley* v. *Pinkney & Sons Steamship Co.*, L. R., 1 Q. B. Div., 58, it was decided in the Court of Appeals that the captain and crew employed in the navigation of a ship by the owner are fellow-servants engaged in a common employment. The injury in that case was the result of the negligence of the captain in failing to have adjusted a movable railing before a storm, the railing having been supplied by the ship owners and in proper condition.

In *Russell Creek Coal Co.* v. *Wells*, 96 Va., 416; s. c., 31 S. E., 614, it was held that where the condition of the place where the miner was working was constantly changing, and the duty of keeping it in safe condition in the prosecution of the work devolved on the miner and mine boss, the mine boss was a fellow-servant of the men.

To the same effect, see

Hughes v. *Oregon Improvement Company*, 20 Wash., 294; s. c., 55 Pac., 119.

The same rule was applied with reference to coal mining by the Supreme Court of Ohio in *Consolidated Coal and Mining Company* v. *Clay's Adm'r.*, 51 Oh. St., 542; s. c., 38 N. E., 610, 613, although we know that the Ohio courts have made a distinction as to grade of service. In the opinion it is said:

"Here the place was not furnished as, in any sense, a permanent place of work, but was a place in which surrounding conditions were constantly changing, and, instead of being a place furnished by the master for the employes, within the spirit of the decisions referred to, was a place the furnishing and preparation of which was

itself part of the work which they were employed to perform. The distinction is shown in a number of cases, among which may be cited *Frazer* v. *Lumber Co.*, 45 Minn., 235, 47 N. W., 785; *McGinty* v. *Reservoir Co.*, 155 Mass., 183, 29 N. E., 510, and *Coal Co* v. *Schaller*, 42 Ill. App., 619. See, also, *Hall* v. *Johnson*, 3 Hurl & C., 589; *Waddell* v. *Simoson*, 112 Pa. St., 567, 4 Atl., 725."

See, also,

Finalyson v. *Utica Mining Co.*, 67 Fed., 507 (C. C. A., 8th Circuit).

Cincinatti, N. O. & T. P. Ry. Co. v. *Mealer*, 50 Fed., 725 (C. C. A., 6th Circuit).

Ling v. *St. P., M. & N. R. Co.*, 50 Minn., 160; s. c., 52 N. W., 378.

In the last case cited the Supreme Court of Minnesota held a master not responsible to a servant for the act of a foreman in negligently selecting a defective instrument —an iron hook—to which to attach a pulley to lift a heavy weight in a boiler shop.

See, also,

Ross v. *Walker*, 139 Pa. St., 42; s. c., 21 Atl., 157.

In *Ell* v. *N. P. R. Co.*, 1 North Dakota, 336; s. c., 48 N. W., 222, there is a well-considered opinion on the above proposition.

Miller v. *N. Y., N. H. & H. R. R. Co.*, 26 N. E., 282, is the latest ruling of the Massacusetts Court.

In *Frazer* v. *Red River Lumber Company*, 45 Minn., 235; s. c., 47 N. W., 785, it appeared that there was a crew of men engaged in a yard to pile lumber. The plaintiff was engaged in assorting and scaling. In making one

of the piles, the pilers negligently projected as a step an unsound and unsafe board, and plaintiff, while ascending the pile in the line of his duty, stepped upon it, causing it to break, whereby he was injured. Held, that he could not recover. Judge MITCHELL says:

"We shall not attempt to do what no court has yet been able to do, viz: to formulate a statement of the rule that will furnish a test by which to determine every case; but *we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform.*"

The rule was applied in *Lindval* v. *Woods*, 41 Minn., 212; s. c., 42 N. W., 1020, where railroad graders were cutting down one place and filling another, and were using material furnished by the master to extend the bridge work as the grading progressed, and the bridge work fell because defectively constructed and injured the plaintiff; held that he was a fellow-servant of the foreman and others who had failed to use properly the material furnished by the master for the construction of the bridge work.

See

Eichler v. *St Paul*, 40 Minn., 262; s. c., 41 N. W., 575.

In *McGinty* v. *Athol Reservoir Co.*, 155 Mass., 183; s. c., 29 N. E., 510, a servant was injured by the falling of a derrick. The derrick was changed from place to place as occasion required, and the moving and adjusting it was the duty of the workmen. It was held that if there was any negligence in the manner in which the post

was sunk it was the negligence of a fellow workman; that the superintendent in this respect was only a fellow servant as between himself and the plaintiff, and defendant would not be liable for his negligence.

The English cases are clear.

Hutchinson v. *Y. N. & B. Ry. Co.*, 5 Exch., 533.

Lovegrove v. *L. B. & S. C. Ry. Co.*, 16 C. B. (N. S.), 669.

Tarrant v. *Webb*, 18 C. B., 797.

Ormond v. *Holland*, Ell. B. & E., 102.

Morgan v. *Railroad Company*, L. R., 1 Q. B., 149.

The fire bosses were also fellow servants of the deceased under the circumstances of this case.

Hughes v. *Oregon Improvement Co.*, 20 Wash., 294; s. c., 55 Pac., 119.

This was held, also, in *Lehigh Valley Co.* v. *Jones*, 86 Pa. St., 438. It will be found that the system of ventilation commented on in that case was similar to the one in the case at bar, with the exception that in that case a shaft was sunk to the coal vein, whereas in the case at bar the air was forced down the main slope, which was driven down along the vein.

Red-stone Coke Co. v. *Robey*, 115 Pa. St., 364; s. c., 8 Atl., 593.

Waddell v. *Simoson*, 112 Pa. St., 567; s. c., 4 Atl., 725.

Lincoski v. *Coal Co.*, 157 Pa. St., 153; s. c., 27 Atl., 577.

So, too, as a siphon was furnished and put in operation, it is manifest that the one whose duty it was to see to the opening or closing of the siphon, or that it was kept running, was also a fellow servant in this respect.

Jones v. *Granite Mills*, 126 Mass., 88, and authorities heretofore cited.

But there was no evidence that the siphon was not kept running when necessary to keep down the water in the fourth left air course to a sufficient extent. The burden was certainly on the plaintiff, in any event, to show that such was not the fact, and that there was negligence in this respect.

The company had done all that could have been expected of it. It had made the necessary rules and prescribed the necessary precautions, furnished the necessary appliances, employed men who understood the business for which they were employed, and who, when employed, appeared to be competent. It had employed men to examine for gas and remove the same; also to see that the ventilation was good and to render the work as safe as possible. What more could it do? Should it hire other men to see that those employed discharged their duties, and even had it done this, what assurance would there be that there might not at some time be negligence in some man performing his duty? Must others be employed to watch them, and so on? If so, there never would be an end to the employment of men. Plaintiff's intestates had no more reason to assume that they would be indemnified against the risk of being injured through the negligence of other workmen than they could assume that because they were

paid to do their work carefully the employer undertook to indemnify other workmen against their possible neglect.

THIRD. ASSUMING THAT SOMEONE HAD GONE INTO ROOM 8 WITH A NAKED LIGHT OVER THE DANGER SIGNALS, AND THAT GAS HAD BEEN IGNITED THERE, CAUSING THE EXPLOSION, YET AS THE COMPANY HAD FURNISHED SAFETY LAMPS AND THE PROTECTION BY THE USE OF FIRE SIGNALS WAS ADEQUATE TO PREVENT ANY DANGER ON ACCOUNT OF GAS, IF OBSERVED BY THE MEN AS REQUIRED, THE COMPANY HAD USED REASONABLE CARE AND DISCHARGED ITS DUTY. THE MASTER DOES NOT INSURE THE SAFETY OF HIS SERVANTS.

It is undisputed, under the evidence, that gas is not explosive unless it comes in contact with a naked light and there is a proper admixture of air; also that workmen could go into a room with gas without the danger of explosion by using safety lamps, and that safety lamps were furnished; also, that the fire-mark or signal was so plain and being placed along the track would be so conspicuous that no one could go over the same without seeing it. This visible fire-mark or danger signal was placed a few feet above the last cross-cut in room 8, and another one a little below, so that if we indulge in plaintiff's theory no one could go up to standing gas, if any, in room 8 without passing over these danger signals. This was a precaution well known in that mine, and was the one in general use. The mine operator had no more reason to expect that such a signal would be disregarded by any of the men than the deceased themselves. If we were to assume, therefore, that it was the duty of the company to

use precautions to prevent gas explosions, this duty was fulfilled by the use of such precautions, as well as by the well-known order or well-understood custom that no one was allowed to go over such fire-mark without using a safety lamp.

Moreover, room 8 was at the time finished. Miners were not expected to work there; it was not a "working place," and it would be unusual to expect that anyone would go into this room. There remained nothing to be done in that room except at some time or other to remove the track therein which was no longer being used. It would necessarily be expected that anybody going in for that purpose would heed the precaution and use a safety lamp. The undertaking of the master is not that of insuring the safety of his workmen, even as against appliances which it is the master's duty to furnish. In respect to such things, it is well settled that the master is only expected to use reasonable care to furnish appliances reasonably safe—not absolutely safe.

A. T. & S. F. R. Co. v. *Wagner*, 33, Kan., 660.

It did not appear that any other precautions could have been taken or were in use in coal mining than those adopted. Indeed, from the evidence, such precaution seems to have been the usual one in the business. Such fire signal was indicated as a "dead line," was well known to miners, and as one over which no man should pass using a naked light. In the operation of a coal mine the business itself is necessarily of a most hazardous and dangerous character, particularly in mines where gas is generated. In the operating of this class of mines, absolute safety is unattainable, and the defendant was not an insurer of plaintiff's intes-

tates. It was liable for consequences, not of danger, but of its negligence, if any.

In the case of *Bertha Zinc Co.* v. *Martin's Adm'r*, 93 Va., 791; s. c., 22 S. E., 873, it was held that ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised, and must be ascertained by the general usages of the business. In the opinion it is said:

"All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man."

In *Berns* v. *Coal Company*, 27 W. Va., 285, the following language is used:

"The owner of a coal mine is not required to resort to the most expensive methods for keeping the mine free from fire damp, in order to escape responsibility for injury to his servants working in the mines caused by an explosion of the fire-damp. If he has reasonably safe methods in use for the proper ventilation of the mine and uses reasonable care to keep the mine properly ventilated and fire-damp expelled therefrom, he will not be responsible. He is not held to extraordinary care.

"Any different rule from this last one would be disastrous to mining interests. If every proprietor of coal mines should be held responsible for all the injuries to

his servants caused by the explosion of the fire-damp, unless he procured all the new and expensive machinery which might be invented to prevent such explosions, the result might be that a monopoly in mining would be created because none but heavy capitalists would be able to procure the new machinery."

See

Miss. River Logging Co. v. *Schneider*, 20 C. C. A., 390, 394 and 395.

Hunt v. *Kile*, 98 Fed. Rep., 52. (C. C. A., 7th Cir.)

FOURTH. AS IT WAS WELL KNOWN TO THE DECEASED THAT THE ONLY METHOD USED OF INDICATING THE PRESENCE OF GAS IN SUCH PLACES WAS BY THE FIRE SIGNALS, AND THAT THE ORDERS AND WELL-KNOWN CUSTOM IN THE MINE WERE THAT NO ONE SHOULD GO OVER SUCH SIGNALS WITH A NAKED LIGHT, THEN IF PLAINTIFF'S THEORY WERE ESTABLISHED, THAT THE EXPLOSION WAS CAUSED BY SOME OF THE WORKMEN DISREGARDING THE SIGNAL AND GOING OVER THE SAME WITH A NAKED LIGHT, STILL THE DECEASED, KNOWING THE MANNER IN WHICH THE MINE WAS BEING OPERATED IN THIS RESPECT, ASSUMED THE RISKS AND DANGERS ARISING FROM THE POSSIBILITY OF THE NEGLIGENCE OR DISOBEDIENCE OF OTHER WORKMEN. IN SUCH CASE THERE WOULD BE NO CULPABLE NEGLIGENCE ON THE PART OF THE MASTER, THE NEGLIGENCE, IF ANY, BEING WAIVED BY THE SERVANT; SO THAT THE ONLY NEGLIGENCE, IF ANY, WOULD BE THAT OF A FELLOW-WORKMAN IN DISREGARDING THE PRECAUTIONS.

For the sake of argument it may be admitted generally that ordinarily it is the duty of the master to use reasonable care to furnish a reasonably safe place for his servant; but this is only assumed from the nature of the agree-

ment, and can only be assumed when it is shown that the servant has any reason so to presume. From the preceding argument, it is manifest that one who undertakes to carry on a business, as to those who engage to co-operate with him and assist in carrying it on, has the right to conduct it in such way as to him may seem best, and although his method be not the best, he does no wrong to one who knows how it is being conducted and voluntarily enters into his employment or continues therein after knowledge of the means adopted. In such a case, the servant cannot close his eyes to the manner in which the business is being conducted, and if injured then say it might have been conducted in some other or better manner. As to such a person the master cannot be deemed to have been negligent in the manner of conducting his business. Such person cannot be heard afterwards to complain of that manner. It is immaterial then whether gas would be permitted to accumulate, with only such precaution to designate its presence, twenty-four, forty-eight or fifty-six hours. The risk of danger of some one disregarding the signal was just the same.

In *Wormell* v. *Maine Central R. Co.*, 79 Me., 397; s. c., 10 Atl., 51, it was said:

"Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circumstances must judge for himself whether he will enter his service, or, having entered, whether he will remain. *Hayden* v. *Smithville Mfg. Co.* 29 Conn., 548; *Buzzell* v. *Laconia Manuf g. Co.*, 48 Me., 121; *Shanny* v. *Androscoggin Mills*, 66 Me., 427; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass., 585; *Ladd* v. *New Bedford R. Co.*, 119 Mass., 413."

It is further stated:

"But there are corresponding duties on the part of the

servant; and it is held that the master is not liable to a servant who is capable of contracting for himself and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Lovejoy* v. *Boston & L. R. R.*, 125 Mass., 82; *Ladd* v. *New Bedford R. Co.*, *supra*; *Priestly* v. *Fowler*, *supra*."

This rule was applied in the recent case of *Hunt* v. *Kile*, 98 Fed. Rep., 49, 53. (C. C. A., 7th Circuit.)

See, also,

Wilson v. *Winona & St. P. R. Co.*, 37 Minn., 326; s. c., 33 N. W., 909.

Smith v. *Winona & St. P. R. Co.*, 41 A. & E. R. Cas., 289.

Hawk v. *Pennsylvania R. Co.*, 11 Atl., 459.

Rush, Adm'x. v. *Mo. Pac. Ry. Co.*, 36 Kas., 129.

The discussion of Mr. Justice Valentine in the last case cited is worthy of perusal.

The rule was virtually applied in *Southern Pac. Co.* v. *Seley*, 152 U. S., 145, and in *Randall* v. *Railroad Company*, 109 U. S., 478, as well as in *Seymour* v. *Maddox*, 16 Q. B. (A. & E., N. S.), 326: *Goodridge* v. *Washington Mills*, 160 Mass., 234.

The rule was recognized in the elaborate opinion of the Supreme Court of New Mexico when this case was before it in review of the first trial.

Cerillos Coal Railroad Co. v. *Deserant, Adm'x.*, 49 Pac., 807.

See, also,

Linton Coal & Mining Co. v. *Persons* (Sup. Court Indiana), 43 N. E., 651.

A vast number of authorities might be cited on the same proposition.

Now, it is clear from this principle that under such assumption of risk it cannot be contended that there was any actionable negligence of the master in the means adopted or by reason of any failure to carry on the business in some other way; for, as said in Bailey on Masters' Liability for Injuries to Servants, page 198:

"A risk assumed is one which was or becomes embraced in the contract. It cannot be made to depend upon the conduct of the servant, for it has been assumed."

It was clearly pointed out in *Perigo* v. *Chicago, R. I & P. R. Co.*, 52 Ia., 11, in the following language:

"It is now the established doctrine of this court, in harmony with the current of authority elsewhere, that an employe who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby. (*Muldowny* v. *Illinois Central Ry. Co.*, 39 Iowa, 615; *Kroy* v. *C. R. I & P. R. Co.*, 32 Iowa, 359; *Way* v. *The Illinois Central Ry. Co.*, 40 Iowa, 341; *Lumley* v. *Caswell*, 47 Iowa, 159.) * * * The doctrine of these cases is that the negligence of the defendant in furnishing defective or improperly constructed machinery and implements is waived by remaining in the employment without protest or promise of amendment. *The waiver of the negligence of the defendant places the case in the same position as though the defendant had not been negligent, and without the negligence of the defendant there can be no recovery.* This waiver cannot be affected by the particular situation in which the employe may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident."

Approved by the same court in the subsequent decision of *Wells* v. *B. &c. R. Co.*, 52 Iowa, 520.

In *Assop* v. *Yates*, 2 H & N., 768, plaintiff, a laborer, was employed by defendant to do work at the building of a house in a street, and there had been a boarding put up to protect the building from carriages passing. Plaintiff had complained that the boarding was too narrow to permit him to pass with a hod of mortar. While he was working, a vehicle came up the street and struck the boarding, in consequence of which he got injured. In an action against his employer he was non-suited, as, after he had complained, he had continued working there voluntarily, with full knowledge; and the part which the master had in the injury was too remote.

A false sentiment is sometimes indulged in over this rule as though it were contrary to reason or right that the master should be exempted from liability, even though the servant subjected himself to the risk without complaint; but the language of Lord Bramwell may be referred to as disposing of any question of sentimentality. He said on one occasion:

"It is said that to hold the plaintiff is not to recover is to hold that the master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it. This sounds very cruel, but do not people go to see dangerous sports? Acrobats daily incur fearful dangers, lion tamers and the like. Let us hold to the law. *If we want to be charitable, gratify ourselves out of our own pockets.*"

By way of further illustration, it may be added: Does not the soldier incur all the risks of warfare, whether known to him or not, and solely for fame or a small reward?

Personal knowledge of the means adopted by the company was brought home to plaintiff's intestates, as shown by the evidence. They knew that gas might accumulate

in any part of the mine, and that the danger signal was the only means adopted to indicate its presence. They also certainly knew as well as their employer that it was possible some fellow-workman might be negligent or careless enough to disregard or not heed the signal. They, therefore, knew the possible danger and risk therefrom. If plaintiff's theory, then, were correct, the proximate cause of the accident was at most the negligence of fellow servants who disregarded the signals or or precautions.

The well-considered case of *Berns* v *Coal Company*, 27 W. Va., 225, goes farther. It was held that if the proprietors of a coal mine have been negligent in permitting fire-damp to accumulate in their mine, which will not produce any injury until ignited, and if it be ignited by a fellow servant who goes into the dangerous part of the open mine with a lighted lamp instead of a safety lamp, contrary to the orders of the proprietors of the mine, and by such a lighted lamp the fire-damp is ignited and exploded, by which a servant is injured, such explosion and injury having been directly and immediately caused by a fellow servant and not by the negligence of the master, the master under the circumstances cannot be held responsible for such injury. The court, after a very elaborate discussion of all the authorities, declares the law to be as follows:

"In the cases which I have cited from other states, the two causes together, the negligence of the master and the negligence of the fellow servant caused the injury to the servant. If, therefore, it appears that the proprietors of a coal mine had been negligent in permitting fire-damp to accumulate in their mine, which would not produce any injury until ignited, and if it were ignited by a fellow servant, who went into the dangerous part of the mine with a lighted lamp, contrary to the orders of the proprietor of the mine, and by such a lighted lamp the fire-

damp was ignited and exploded, by which a servant was injured, such explosion and injury would be directly and immediately caused by the act of the fellow servant and not by the negligence of the master, and the master under these circumstances would not be responsible for such injury. We do not say that these were the facts. It may be that those who went into the mine did not take lighted lamps, and the gas was ignited in some other way. It may be that the mine 'boss' had not done his duty in exploring the mine with the safety lamp to discover the presence of gas; and it may be that no order had been given not to enter that part of the mine without taking the safety lamp; all these are questions for the jury as to the manner in which the explosion occurred."

In *Kivem* v. *Providence, G. & S. Min. Co.*, 70 Cal., 392; s. c., 11 Pac., 741, an action was brought against a mining company for personal injuries suffered by an employe, where the testimony disclosed that a partition between the stairway and car-track in the shaft of a mine which plaintiff was ascending was defective, so that a timber thrown down the car-track went into the stairway and injured him, but that the promoting cause of the injury was the negligence of a co-employe in throwing the timber down the shaft. The court said:

"All the testimony showed that the immediate and proximate cause of the injury sustained by plaintiff was the negligence of his co-employe. * * *

"'The proximate cause of the injury is the object of inquiry, and when discovered must be regarded and relied on.' * * * Even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause of the injury is the negligence of a fellow servant, no recovery can be had. Wood, M. & S., 812. The same rule must apply where the appliances for doing work are defective. Even if we could assume, therefore, that the partition between the two compartments of the shaft was not as complete as it should have been, or that the plaintiff would not have been injured if a continuous bulwark had been erected

between the two compartments, or if the posts had been nearer together, still, as the case clearly shows that the plaintiff would not have been injured except for the gross negligence of the co-employe, and that such negligence was the immediate and proximate cause of the injury, and if the appliances furnished by the defendant had been used with ordinary care the injury would not have occurred, the non-suit was proper."

In *Allen* v. *Gas Company*, L. R., 1 Exch. Div., 251, it appeared that defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendants, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell and injured him. It was held that defendants were not liable, as the plaintiff had not shown that the persons employed by defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow workman of the plaintiff.

This case is not, therefore, analogous to one in which the negligence of the master concurred with that of a fellow workman in causing the injury, for in this case the servant cannot charge the master with culpable negligence, as he was aware of the means adopted and made no objection. The case is entirely different from that of *Grand Trunk Ry. Co.* v. *Cummins*, 106 U. S., 700, in which there was nothing involved but the correctness of an instruction, to the effect, that if the co-servant was negligent, and if the company was also wanting in ordinary care and prudence in discharging its duties, and

such want of ordinary care contributed to produce the injury, *and the plaintiff did not know of such want of ordinary care and prudence*, the defendant would be liable; that if two of these causes contributed the company would be liable; and that the mere negligence of the co servant of itself does not exonerate it (the company) if one of their own faults contributes. As stated in the opinion, this instruction was in effect that if the negligence of the company contributed to—that is to say, had a share in—producing the injury, the company was liable. *But it was a case in which the plaintiff did not know of the negligence or want of care in the defendant.*

In the instructions of the court, the attention of the jury was directed to the provisions of an Act of Congress approved March 3, 1891, 26 U. S. Stats. at Large, page 1104; but no point was made upon this statute in plaintiff in error's brief in the Territorial Supreme Court. For the first time is the statute seriously urged in this court. Neither is any count in the declaration in terms based upon such statute, it being nowhere alleged that the acts or neglect complained of were "contrary to the form of the statute in such case made and provided," nor was any particular proof offered that the mine was of a depth of one hundred feet or more. The act in question provides for the appointment by the government of a mine inspector in each of the organized and unorganized territories; also his eligibility; and prescribes his duties in regard to examining mines and making report concerning ventilation, etc. All this was done; and the official mine inspector examined this mine monthly and approved of the methods used, and found that the ventilation at the times of his examinations was more adequate than as prescribed in this act.

Section 4 of the act provides that if such mine inspector should report any coal mine not properly constructed, or not furnished with reasonable and proper machinery and appliances for the safety of miners and other employes, it should be the duty of the Governor of the Territory, or of the Secretary of the Interior, to *give notice* to the owners or managers of such coal mine that such mine is unsafe, *notifying* them in what particular the same is unsafe, and *requiring them to furnish or provide such additional machinery*, slopes, entries, means of escape, *ventilation or other appliances necessary within a period to be in said notice named;* and if the same be not furnished as required by said notice, it shall be unlawful after the time fixed in such notice for said owners or managers to operate said mine.

Section 6 provides generally that the owners or managers of coal mines of a depth of one hundred feet or more should "provide an adequate amount of ventilation," not less than fifty-five cubic feet per second or thirty-three hundred cubic feet per minute for every fifty men at work in the mine, and in like proportion for a greater number, which air should by proper appliances or machinery be forced through such mine to the "face of each working place," so as to dilute and render harmless and expel therefrom the poisonous gases, etc. To require one to "provide an adequate amount of ventilation" is ambiguous and incorrect. It should read "provide ventilation to an adequate extent" or "provide adequate ventilation"; that is, provide the method and means by which an adequate amount of pure air should be secured, etc. Nature provides the air, and man the appliances for or method or process of replacing foul air by pure in any enclosed place. The latter is ventilation. It is the fanning process.

No particular method or system to be used is pointed out in the act, and evidently it was merely intended to prescribe generally that a system or means of ventilation should be adopted which would furnish at least the amount of air prescribed, and by which this air should be forced to the "working places" where the miners would necessarily be at work. This was done. Sufficient appliances were provided and set in operation.

Section 7 provides:

"That any mine owner or manager who shall continue to operate a mine after failure to comply with the requirements of this act, *and after the expiration of the period named in the notice provided for in section four* of this act, shall be deemed guilty of a misdemeanor, and shall be fined not to exceed five hundred dollars."

Section 16 provides, as a cumulative remedy in case of failure of the owner or manager of the mine to comply with the notice given, that an injunction should be granted on the application of the mine inspector, restraining the further operation of the mine until the requirements are complied with, no bond being required.

There is no attempt in the act to impose a civil liability upon the company as owner or manager, nor does there appear to be any intent to alter the rule of the common law and make the master liable to his servant where he would not be liable in damages at common law for the negligence of one who would be regarded as a fellow-servant at common law.

It is well settled, as stated in Potter's Dwarris on Statutes, 185:

"Further, as a rule of exposition, statutes are to be considered in reference to the principles of the common law, for it is not to be presumed that the legislature in-

tended to make any invasion on the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly pronounced."

Sutherland on Statutory Construction, Sec. 401.

In *Detroit* v. *Putnam*, 45 Mich., 263, 265, it was said:

"Where a statute attempts, in derogation of the common law, to create a liability, we cannot go beyond the clearly expressed provisions. Such statutes are not to be extended or enlarged in their scope by construction."

On this subject the following appears in Thompson on Negligence, Sec. 1005:

"The legislature will not be held to intend a repeal of the settled rules of the common law unless the language employed by it clearly imports such an intention."

Section 6 of the foregoing act of Congress appears to have been copied to a large extent from the seventh section of the act of March 3, 1870, of Pennsylvania. (Purd. Dig., 1069, pl. 7.)

Section 7 of the Pennsylvania act provided:

"The owner or agent of every coal mine or colliery shall provide and establish for every such coal mine or colliery an adequate amount of ventilation of not less than fifty-five cubic feet per second of pure air or 3300 feet per minute for every fifty men at work in such mine and as much more as circumstances may require, which shall be circulated through to *the face of each and every working place* throughout the entire mine to dilute and render harmless and expel therefrom the noxious poisonous gases to such an extent that the entire mine shall be in a fit state for men to work therein, and be free from danger to the health and lives of the men by reason of such noxious and poisonous gases, and *all workings shall be kept clear of standing gas;* the ventilation may be produced by using blowing engines, air pumps, forcing or suction

fans, of sufficient capacity and power, or other suitable appliances, as to produce and insure constantly an abundant supply of fresh air throughout the entire mine; but in no case shall a furnace be used in the mine where the coal breaker and chute buildings are built directly over and covering the top of the shaft, for the purpose of producing a hot upcast of air, and there shall be an intake air-way of not less than 20 square feet area and the return air-way shall not be less than 25 square feet."

It will thus be seen that section 6 of the act of Congress is identical in language—almost word for word—with the first part of the foregoing provision of the Pennsylvania statute down to the suggestion in respect to the kind of ventilating appliances. The latter part of the section of the Pennsylvania law, however, points out more specifically the appliances which may be used. In the act of Congress this is left to be specifically designated under section 4 by the public mine inspector and governor of the territory.

Section 8 of the Pennsylvania statute provided for the employment of a mining boss and prescribed his duties, among other things requiring him to examine the workings of all mines generating gas every morning before the miners shall enter, and to ascertain if the mine is free from danger. It is also made his duty to measure the ventilation at least once a week, etc.

In the case of *Lehigh Valley Coal Co.* v. *Jones*, 86 Pa. St., 432, the above act was under consideration. The injury was caused through the alleged negligence of the mining boss in permitting fire-damp to accumulate in a certain part of the mine. It was held that the mining boss was nevertheless a fellow servant of the other workmen, and for his neglect to observe the statutory duties, the master could not be held liable, it appearing in the case that the appli-

ances for ventilation and the system thereof were good, so that the statute was complied with when the proper system of ventilation and appliances were furnished. In the statement of the case it is said :

"The method of ventilation, in general use in the Wyoming coal fields, and, indeed, throughout the entire anthracite region, is by sucking or drawing the air from some distant inlet into the mine, called a 'down cast,' through the mine and thence up and out by what is called the 'up cast,' which is near the shaft. *This system requires that the currents of air shall be carried against the parts of the mine being worked, the 'workings' specified in the ventilation act. This results in separating the worked out part of the mine from the part being operated; the direct currents being thrown against the breasts being worked, and the old or worked chambers and gangways being ventilated by the general suction of air through the whole mine.*"

The place where a miner would be at work, being the "working place," or at the face of the room, was ventilated by a sufficient air current. Room 8, however, was a finished or abandoned room, and no miners would be working there. This room would therefore simply perform the function of affording a channel or passageway through which air might be conducted to other rooms which were being worked in the same or other entryways. There did not exist the same reason for requiring the same particularity of forcing air to the face of an abandoned room as there would be where a room was being worked, or an actual "working." In the case at bar, as in the above case, the system and appliances being furnished, and competent men to operate being employed, the coal company had done all that could be expected of it.

In *Wilson* v. *Merry and Cunningham*, L. R., 1 Scotch App., 327, Lord Chelmsford, on pages 339 and 341,

distinctly held that an Act of Parliament created no civil liability in favor of a servant, which by one section prescribed certain rules to be observed in every coal mine by the owner thereof—among others, that an adequate amount of ventilation was to be constantly produced in all coal mines, etc., to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels and workings should under ordinary circumstances be in a fit state for working therein; and by another section it was provided that if any of the rules were wilfully neglected by the owner or agent of a mine such person should be liable to a penalty of £20. He held the statutory duty was created absolutely for the purposes of the act, but could only be enforced by the penalty, and that it did not alter the rule in regard to fellow servants.

In *Howells and others* v. *Landore Siemens Steel Company*, L. R., 10 Q. B., 62, defendants, owners of a colliery, had appointed, as required by statute, a certificated manager. A miner employed in the colliery was killed by an explosion of fire-damp, death being caused by the negligence of the manager in violating a general provision of the statute, that in certain cases of danger the miners should be withdrawn from the mine. Held, notwithstanding the statute, the manager was a fellow servant of the deceased, and there could be no recovery.

Where the Pennsylvania statute heretofore referred to provided for the employment of a skillful inside overseer or mining boss, upon whom such statute imposed among other things, the duty of seeing that the roofs of mines should be properly secured after a blast and that a right of action should accrue to the party injured through failure to observe the statute, and in case of death to his widow or any of his heirs, it was held that the mining

boss was nevertheless the fellow servant of the miner, and that the miner assumed "the risks that are ordinarily incident" to mining, "among which are those accidents that may result from the negligence of co-employes, of whom, as we have seen, the mining boss is one."

Waddell v. *Simoson*, 112 Pa. St., 567; s. c., 4 Atl., 725.

In *Redstone Coke Co.* v. *Robey*, 115 Pa. St., 364; s. c., 8 Atl., 593, it was held, under the same act as above, that where the mine owners had exercised reasonable care in she selection of a competent mining boss and the mining boss was negligent in not making an investigation for accumulated gas, the company was not liable. The court said:

"His co-employes take the risk of his negligence, precisely as in other cases. If he is incompetent or careless they can at once discover it and notify the superintendent, while the owners, with every wish to protect the miners, have no such opportunities of information. * * * The explosion was caused by the open lamp of the plaintiff coming in contact with the damp black that had accumulated in the mine. It was alleged that no examination of the mine was regularly made with a safety lamp, and that no proper measurement was made of the air course. If we regard these allegations as established by the verdict, it only proves the mining boss to have been negligent, of which fact the miners themselves had ample means of knowledge while the owners had none."

In *Delaware, etc.*, v. *Carroll*, 89 Pa. St., 374, it was held that this act did not change the relation of fellow servants or the common law in that respect.

See, also,

Spiva v. *Osage Coal & Mining Co*, 88 Mo., 73.

In *Atkinson* v. *Newcastle & Gateshead Waterworks Company*, L. R., 2 Exch. Div., 441 (before Lord Chancellor Cairns, Cockburn, C.J., and Brett, L. J.), it appeared that by statute the company were to maintain fire plugs, keep the same at all times charged with water at a certain pressure and allow all persons to use the same to extinguish fire, without compensation, etc. A penalty for failure was imposed. Plaintiff brought an action for damages against the waterworks company for not keeping their pipes charged as required by the act, whereby his premises, situated within the limits of the act, were burned down. Held, that the statute gave no right of action to plaintiff, and that the breach of a public statutory duty which has caused damage does not vest right of action in the person suffering against the person guilty of the breach.

In *Knisley* v. *Pratt et al.*, 148 N. Y., 382; s. c., 42 N. E., 986, it was held that a statute of New York imposing a penalty on the owner of factories in which women were employed for failure to cover cog-wheels, did not prevent a woman from assuming the risks from uncovered cog-wheels; that even such statute was subject to the common law doctrine of the assumption of risks by the servant.

This rule has been applied under a similar statute in *White* v. *Witteman Lithographing Company*, 131 N. Y., 631; s. c., 30 N. E., 236, where a boy under fourteen years of age was injured owing to absence of safeguards required by statute.

To the same effect is *Higgins Carpet Company* v. *O'Keefe*, 25 C. C. A., 220, where a boy fifteen years old, employed in a factory, was injured by unprotected cog-wheels required under the factory act to be covered.

To the same effect is *Graves* v. *Brewer et al.*, 38 N. Y. Suppl., 566; s. c., 4 App. Div., 327.

In *O'Malley* v. *South Boston Gas Light Co.*, 158 Mass., 135; s. c., 32 N E., 1119, it was held that, under a statute imposing a specific liability upon the master in favor of the servant on account of a defect in the works, machinery, etc., the common law rule as to the assumption of risks was still applicable.

It is also well settled that even under a statute which does in terms impose a civil liability upon the master, contrary to the rule of the common law, nevertheless in all other respects the case is governed by the rules of common law applicable, and that the servant still assumes the risks incident to the business in the manner in which it is carried on.

Thomas v. *Quartermaine*, L. R., 18 Q. B., 685.

So in *K. P. Ry. Co.* v. *Peavey*, 34 Kas., 472, 479 and 480, it was held that even under a statute making a railroad company liable to an employe for the negligence of a co-employe, the employe would still be deemed to have assumed the risk of incompetency or negligence of a fellow servant, if he knew of the same and continued thereafter in the employment.

The act, however, is penal (see the seventh section), and must, therefore, be strictly construed. The same construction must be adopted, whether it is sought to enforce a civil or criminal liability, because the same language used cannot be held to mean one thing for one purpose and another thing for another purpose. Section 6 provides no specific method or appliance to be adopted. Section 4, however, does provide how the mine-owner or

manager may be advised as to what appliances or methods to use, or what to do in respect to ventilation and other things. His operation of the mine does not become wrongful or contrary to the statute until, after the time fixed in the notice to him, he fails to adopt the precaution or appliance suggested and continues to operate the mine; and section 7 makes it wrongful to continue to operate only after a failure to comply with the requirements "*and after the expiration of the period named in the notice provided for in section 4*"

The owner is therefore not guilty of any violation of the act until he has been notified that his method is not sufficient and has been advised by the public inspector, as to what means or precautions to take. So, there cannot be held to be any failure to comply with the provisions of this act until a notice has been given him.

This was dictinctly ruled in *Borck* v. *Michigan Bolt and Nut Works*, 111 Mich., 129; s. c., 69 N. W., 254, where a boy twelve and one-half years old, employed in the shops or factory, was injured by falling into uncovered cog-wheels. The statute relative to manufacturing establishments provided in one section: "All gearing and belting shall be provided with suitable safeguards."

In a subsequent section it was provided:

"If * * * belting, shafting, gearing, elevators and machinery * * * are located so as to be dangerous to employes and not sufficiently guarded, * * * after due notice of such defect said proprietors * * * shall be deemed guilty of violating the provisions of this act."

Another section provided a penalty for its violation. Another section also provided for the examination of factories by a public inspector, who should give notice of all defects, etc. It was held that under this statute there

could be no violation thereof and therefore no liability at all events until after the due notice to be given by the inspector had been given.

In the case at bar, the United States mining inspector had examined and approved the system and appliances for and method and means of ventilating this mine. There can, therefore, be no pretense that there had been any violation of the statute.

In any event, to constitute a violation of the statute, there must be shown a willful or intentional failure to observe its requirements. Mere neglect or unintentional failure is not sufficient. Can it be possible that the penalty given in terms does not attach under the act unless there be shown to be a wilful or intentional violation of its provisions and only after notice, yet a civil liability not imposed in terms may follow as matter purely of legal inference or construction from a mere neglect or unintentional failure to come up fully to all the requirements of the statute? Can it be that for the purpose of imposing a penalty the provisions of the statute are not regarded as violated, unless the act be wilful, intentional and done after notice, but for the purpose of imposing by construction alone a civil liability the same provision will be held to be violated by mere unintentional failure? This does not seem reasonable. The same language must have the same meaning. An act cannot be said to be "contrary to the statute" in the one case unless it be also in the other.

The common law rule which requires the master to exercise reasonable care in selecting reasonably competent and efficient co-employes, and in furnishing adequate appliances, is all that can in reason be required of the master. A statute which imposes in terms a liability

upon the master beyond this and for the negligence of other employes has not the slightest tendency to prevent accidents or injuries to the employes themselves. In the annual report of 1899, just issued, of James Roderick, Chief of the State Bureau of Mines and Mining of Pennsylvania, there is a chapter dealing with mine accidents and their causes. He says, among other things:

"Possibly neglect can be traced to some colliery managements, but the greatest neglect is on the part of the employe."

How is it possible that a statute which makes the master the insurer of his servant against the negligence of a fellow workman can have the effect of preventing the fellow servants from being negligent? Can the prescience of man or power of one over the future conduct of another be practically increased by statute? Does such statute render it any more possible for one man to prevent another from being negligent? If it be really the desire of the legislature to protect workmen against injuries and accidents, the only rational way to accomplish such a result is to make the fellow workman, alone, whose negligence has caused the accident, subject to penalties, and empower the master to enforce in an efficient way such penalties. There are some statutes which are to this effect. They are the only ones based upon a rational view of the subject. For this reason, if for no other, the court should not by construction extend the common law liability of the master or alter the common law rule as to fellow servants. A statute which in terms changes this rule has its only basis in a desire to afford pecuniary compensation to a party injured from one who is not himself at fault, merely because the real person committing the wrong may not be able to respond pecuniarily.

IV.

The Assignment of Error Considered.

First: In respect to the evidence.

An examination of the assignments of error in respect to rulings on the evidence will show the objections to be trivial.

The assignments of error are not in accordance with rule 35, as the full substance of the evidence admitted or rejected is not quoted or set out. Merely the questions are set out; but whether the answers were prejudicial or not does not appear.

In the Supreme Court of the Territory there was only a general assignment that the court erred in admitting improper evidence or in refusing to admit proper evidence. For this reason, if no other, the alleged errors should not be considered.

Take the first assignment. The question is:

"Then, if this explosion occurred at 10:45, state whether or not—state what at that particular time the miners in the rooms would be engaged in."

The witness had already testified, without objection, to the question immediately preceding, that he was familiar with the manner in which miners did their work, the times of their firing shots and doing other acts, and that from half past 10 to 11 — sometimes 11:30 — the miners would begin to make their cartridges for the purpose of blasting coal. He was the mine inspector and knew the general course and custom of the work. The answer was:

"Well, they would be loading their coal and after loading their coal, between times they would be preparing

for firing shots, that is, drilling holes, making cartridges, tamping their holes ready to fire at noon."

This appeared from other evidence to be the fact. There was no dispute about it. It was proper, moreover, to prove the custom or usage to make a *prima facie* presumption that the men were doing what they were in the habit of doing.

Knickerbocker Life Insurance Co. v. *Pendleton*, 115 U. S., 346.

So with the second assignment of error. After the same witness had testified without objection that he had seen the effects of a gunning shot, he was asked how far the flame extended. The objection was that this evi dence was wholly immaterial as to what happened on the third right of the White Ash Mine, in regard to a gunning shot before this explosion. The witness stated: "Seventy feet, as far as I knew." The defendant sought to show, among other things, that the explosion might have been caused by the effects of a gunning shot, it being shown that in room 16 there were indications of a shot where all the coal was not blown away, but a part of the hole remained, showing there had been something like a gunning shot there. It has been held by this court that ordinary witnesses might testify how far sparks were thrown from other locomotives than the one which it is claimed set out the fire.

Grand Trunk Ry. Co. v. *Richardson et. al.*, 91 U. S., 454.

We fail to see how the answer to the question set out in the third assignment could have been prejudicial. The witness answered that the effect of a powder explosion, and the flame thereof coming in contact with small quan-

tities of gas, would ignite the gas. The objection to the question was that it involved an assumption that there were small quantities of gas in the mine which would not be dangerous except in the case of a powder explosion. The evidence was not prejudicial, because everyone knows the gas would be ignited if the flame came in contact with it. But the objection to the question is unsound, because the evidence showed that there would be necessarily small quantities of gas in crevices and uneven places in the roof of the rooms. Witnesses testified to there being small cups of gas here and there which would not be at all dangerous to the working of the mine.

The fourth assignment is in respect to a question the answer to which is that men drilling holes may tap gas or a certain break in the roof where gas is given off from the adjoining strata, and that gas is liable to appear. This the witness was competent to testify to from his own experience in that mine, as well as in other mines. The objection to the question was that the witness testified that he saw no evidence of gas in the fourth left at the time of this explosion, and that this was a request to the witness to speculate as to what might have been or might have happened. The evidence is far more unobjectionable than much that was introduced by the plaintiff herself. The evidence was proper to show the reasonable probability of the explosion occurring in room 16 or 17, while the miners would be drilling their holes or working about the coal, in suddenly tapping a seam of gas. This was one of the probable things likely to occur to the miner, and likely to cause an explosion, and would be one of the facts which would more rationally account for the cause and effects of the explosion in and about room 16 than the other theories put forward by plaintiff.

While the question complained of in the fifth assignment may not be artistically framed, yet it is clear no prejudice resulted from the answer. The witness stated that if two men went into room 8 and found the brattice down, and had seen the danger signal lying across the track, they would have fixed the brattice up, and would never have crossed that line—meaning the danger line. The evidence was simply in answer to a question suggested by testimony brought out on the cross examination. We fail to see how it could possibly have prejudiced the plaintiff, for the evidence of plaintiff's own witnesses was to the effect that no one in that mine would cross the danger line or signal if he saw it. The witness was simply attempting to testify as to the duty of the men who should find a brattice down. That is, they would fix it up. The question was provoked by the cross-examination.

The refusal of the court to permit an answer to the question set out in the sixth assignment was proper. The question was asked on cross-examination of one of defendant's witnesses. He had not been asked on his direct examination a single question in respect to the means or want thereof of moving water from any part of the mine. The defendant did not vouch that he had knowledge on this subject, and did not ask him concerning the same. The rule is well settled in this court that the cross-examination must be strictly confined to matters brought out in the direct examination.

The answer of Duggan to the question set out in the seventh assignment of error was proper. It was proper to show that the stoppings in the various cross-cuts of the White Ash Mine were of a kind accustomed to be used and placed in mines of that character for the pur-

pose of diverting the air current to the proper places; for if this was the custom in operating other coal mines of a similar character the evidence would have a tendency to show that the White Ash Mine was operated in the usual manner, and that the method adopted of diverting the air into a channel was the usual one. The objection seems to have been mainly to the competency of the witness; but he testified that from the age of thirteen he had been more or less working in and around mines. The court below adjudged him to be competent. Besides, the witness had read a great deal concerning the workings of coal mines, and he had gained knowledge in various ways, and would therefore be competent to speak upon that subject.

In the eighth assignment of error it appeared that the witness Duggan had been asked whether he knew that for ten days or two weeks before the explosion there was an opening from the return air course to the upper air course leading to the plane of the fourth left, whereby air went to the men on that plane and thence to the third left, without going to the other working places, and he stated he did not know of any such opening. He was then asked the question:

"If such an opening were made by the fire boss under the directions of the mine foreman, should it have been reported to you?"

This was objected to as improper cross-examination, and as being a hypothetical question based upon facts not testified to by the witness or anybody else; and the objection was sustained. It seemed to involve, after all, merely a question of moral obligation or duty whether such fact should have been reported to him. It was not stated, either, what the purpose of this testimony was

nor what it would tend to show. It was not proper cross examination. An answer could not have elicited any fact relevant to the issues.

In respect to the ninth assignment of error, it appeared that on cross-examination by the plaintiff the witness Duggan had testified that after the explosion they were working a force of men night and day getting the mine into working condition from the results of the explosion, before the investigation by the coroner's jury. The question was then asked:

"Unless that had been done, it would have been impossible to go into the mine, would it not, Mr. Duggan?"

This was objected to as calling for the opinion of the witness, and facts speak for themselves. The objection was sustained, and properly. It was wholly immaterial, for that matter, what was necessary to be done after the explosion to get the mine in working order. The question called for the conclusion of the witness upon an immaterial point. This had no tendency to prove the condition of the mine before the accident, the cause of the explosion, or the alleged negligence.

Columbia Rld. Co. v. *Hawthorne*, 144 U. S., 202–207.

The tenth assignment of error is one which should never have been made in this court. It is trivial and was simply the culmination of a series of badgering questions.

It is, however, apparent that none of the evidence objected to or offered could have affected the result or supplied the lack of evidence to support the plaintiff's case, and, therefore, plaintiff could not have been prejudiced by any ruling made.

SECOND: AS TO THE INSTRUCTIONS.

It would have been improper for the court to charge the jury that the plaintiff was entitled to recover, and this disposes of the eleventh, twelfth and thirteenth assignments of error.

In respect to the other assignments on the instructions given, it must be remembered that the plaintiff did not ask any instructions which were not given, except the peremptory one. It is not proper to single out any one clause or paragraph, but the charge should be examined as a whole, and one instruction or paragraph must be viewed in the light of others given.

Spring Co. v. *Edgar*, 99 U. S., 659.

The instructions as a rule were more properly objectionable and rather erroneous as to the defendant than as to the plaintiff.

The third instruction given set out or called attention to the various general charges of negligence in the declaration, and in the sixth instruction the jury were advised that if the allegations of a single count of the declaration were established by a preponderance of the evidence, the plaintiff was entitled to recover. This was unfavorable to the defendant and too favorable to the plaintiff, under the law; for it led the jury to infer a duty on the part of the defendant from the general and uncertain allegations in the various counts of the declaration. The eighth instruction called the attention of the jury to the act of Congress, although no count in the declaration was framed to charge a violation of any statutory duty, and although it is apparent that the court misconstrued this statute in favor of the plaintiff. In the ninth instruction the court defines in general language

what constitutes negligence, and this instruction was certainly more favorable than the plaintiff was entitled to in respect to the duty of the defendant as to the care to be exercised in operating the mine. The tenth instruction defined the duty of the master to use reasonable care and diligence to provide a reasonably safe place for the servant to perform the respective duties and to provide reasonably safe appliances for the protection of his servants and use reasonable care to keep such appliances in reasonably safe condition for the protection of his servants ; that this duty could not be delegated, and that any agent or servant appointed by him for the purpose of looking to the safety of appliances, without regard to rank or station, would be a representative of the master. This is stronger in favor of plaintiff than the law would warrant in respect to coal mining, due to the changing condition of the working places, as shown heretofore. In the eleventh instruction the court advised the jury that if they believed from the evidence that fellow servants of the deceased by their negligence contributed to bring about the explosion in which the deceased were killed, yet if they believed from the evidence that the negligence of the defendant also contributed to the same result they should find a verdict for the plaintiff, unless they believed from the evidence that the plaintiff's intestates knew or had means of knowledge of such negligence of the defendant, and notwithstanding such knowledge or means of knowledge continued to work in the mine. This seems to have been appropriate under the rulings of this court, and was not objected to by plaintiff. So the twelfth instruction advised the jury that it was obligatory upon the defendant to keep the working places of the mine free from standing gas, and that if a failure

to do so contributed to the death of the deceased, they were justified in believing the defendant guilty of negligence.

In the fourteenth instruction the jury were advised that if they believed the explosion originated in room 8, in consequence of the accumulation in said room of a dangerous body of gas, merely guarded by a fire-mark or danger signal, for thirty-six or forty-eight hours before the explosion, and that the intestates did not consent or agree to work in said mine with places dangerous because of gas merely guarded by fire-marks or danger signals for thirty-six or forty-eight hours, the plaintiff was entitled to recover, although the jury might also believe that said body of dangerous gas was ignited by the negligence of fellow servants. This was much stronger than the plaintiff was entitled to.

The assignments of error challenge instructions Nos. 1, 6, 10 and 11, hereafter referred to, given at the request of the defendant.

Instruction No. 1, set out in the fourteenth assignment, was proper in itself, and is in accordance with the well-settled law. It is also to be read in connection with the other instructions given. It is correct as a general proposition.

A. T. & S. F. R. Co. v. *Wagner*, 33 Kans., 660, 666.

Hayden v. *Mfg. Co.*, 29 Conn., 548, and argument heretofore made.

It is not necessary that every instruction or paragraph should embody every phase or theory of the case. The criticism made is not candid, and plaintiff hunts for a construction not warranted in the language used.

The sixth instruction requested by defendant and complained of in the fifteenth assignment was proper so far as plaintiff is concerned. In itself, it is simply to the effect that if, according to the plaintiff's theory, the gas was ignited by Flick and Kelly going into room 8, and if the signals described, warning miners of danger and well known to them, were there and placed in such manner as to be observed by Flick and Kelly, and if the meaning thereof was understood by them and they were known by the miners (necessarily including the deceased) to be in use to inform them of the presence of gas in dangerous quantities, then if the explosion was caused by Flick and Kelly going into the room with a naked light, the defendant would not be liable. This matter has been discussed heretofore. Under such circumstances, there was no culpable negligence in the defendant, and the sole cause of the accident, if it so happened, would be the negligence or disregard by Flick and Kelly of the precautions adopted. The instruction should not be tortured to mean what it does not; but, if anything, should be read in the light of the other instructions given. The instruction contemplates the case in which the deceased (as included in the miners) knew of the precaution adopted to indicate gas, and of the custom and the rule in regard to going into such a place with a naked light. It must also be read in view of the undisputed facts under the evidence.

The deceased would be the first to discover if the air current were bad, but the evidence wholly failed to show that it was not sufficient, or that the water in the fourth left air course so obstructed the current as to render the same insufficient.

Instruction 10, complained of in the sixteenth assign-

ment of error, was perfectly proper. It lays down the law as to the presumption in favor of the defendant, and that the burden of proof is upon the plaintiff to show negligence and to overcome the presumption of care on the part of the master. Such an instruction has always been held proper in the Federal courts. Indeed, they have gone much further, and have usually commented upon the evidence, and to such practice this court has never found objection, but has rather commended it. It ignores no duty, whether imposed by statute or otherwise. They are trying now to insist upon an objection not pointed out at the trial (see marg. p. 485), merely for the purpose of making some point on the act of Congress not discussed at the trial and not relevant under the issues. The concluding part of the instruction is wholly ignored. The rule of evidence stated is correct.

Cogan v. *Burnham*, 56 N. E., 585, 586, and argument heretofore made.

The eleventh instruction, set out in the seventeenth assignment, was proper under plaintiff's theory and contention. While all the witnesses testified to the universal custom that everyone was forbidden to pass over a danger signal with a naked light by reason of the signal itself, one witness testified that this was the rule and order. (Marg. p. 149.) While, perhaps, there was no written rule or order, it was a well-understood instruction, and a rule which was proved also by the custom and fairly deduced from such evidence. The placing of the fire signal was enough to forbid Flick and Kelly or any one else going beyond the same with a naked light, and the plaintiff's theory or assumption is that there was gas in room 8 which was ignited by Flick or Kelly going up to the

same with a naked light. If this instruction contained an improper assumption, plaintiff's theory of the case is improper, and plaintiff cannot complain of an assumption which she has insisted upon to sustain her position. If there was no evidence upon which to base this instruction there was certainly not sufficient evidence upon which to base a liability in the defendant.

The instruction is correct under the authority of *Berns* v. *Coal Company*, 27 W. Va., 285, and authorities cited heretofore. Examined in connection with the undisputed facts it could not be held erroneous. It was established that gas was likely to accumulate in different places and that the precaution adopted against danger was the fire signals, and this was well known to the deceased and was the usual precaution.

Under the seventh head, on page 57, the eighteenth and nineteenth assignments of error are discussed. They are without the slightest merit. Plaintiff did not ask any instructions which were not given. The propositions attempted to be discussed were not embodied in any written request as required by the New Mexico Statute. Sec. 2685, Sub-Section 128, p. 708, Compiled Laws New Mexico, 1897, provides:

"When the evidence is concluded *and before the cause is argued* or submitted to the jury, or the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, *which shall be in writing and shall be given or refused*," etc.

No error can be predicated upon failure to give an instruction not requested in writing. If any of the instructions complained of were not broad enough to cover every phase or theory of the case plaintiff might have asked a modification or presented other instructions. The

general instructions gave all the law necessary. If plaintiff wished the court to instruct upon a special hypothetical theory of the facts, such as that Donahue himself caused the explosion, though the evidence would not justify such an assumption or instruction, she should have asked for the same.

Again, rule 17, set out on page 58, is referred to. Much is sought to be made of the provision: "The mine-boss will personally examine the mine and know all parts thereof are in a safe condition." The plaintiff did not ask an instruction based thereon, and if the speculation is to be indulged in that Donahue caused the explosion, which in the light of the evidence is absurd, yet he was simply performing the acts of a workman at the time, and the cause, if plausible, would be due simply to his negligence as a fellow workman. But rule 17 would not alter the rule of non-liability of the master at common law. If a statute which required the employment of such a boss and prescribed similar duties could not be held to alter the rule of fellow servants, certainly this rule does not alter the same. Neither does the rule in terms show that the master assumes responsibility or liability for the negligence of the mine loss any more than he would for all other employes, who, under the rule, are to report unsafe places to the mine boss. The mine boss was appointed and his duty prescribed; the rule was complied with by the company in so doing.

Neither was it necessary for our opponants to waste time in placing the instructions in parallel columns, as under the eighth head on pages 59, 60 and 61. To the fourteen instructions, which appear to have been given by the court, no objection whatever was taken by plaintiff. Perhaps some were requested by her. These in-

structions were more favorable than she was entitled to under the law and the evidence in this case, but the mere fact that these were given is certainly a poor argument to prove that other instructions given at the request of the defendant, and somewhat more specific in their nature, and which limited somewhat the effect of those given by the court, were therefore erroneous. The instructions given by the court were incorrect from the defendant's, and not the plaintiff's, standpoint, for the plaintiff was not prejudiced by them.

RULING OF THE TRIAL COURT ON MOTION FOR NEW TRIAL.

It was contended before the Territorial Supreme Court and it is still insisted that the trial court erred in overruling the motion for a new trial, because it appeared in the journal entry that the motion was overruled on the ground that there was a conflict of evidence in the cases, and the court was of opinion that in such a case it had no jurisdiction to set aside the verdicts as against the weight of evidence.

The Territorial Supreme Court seems to have taken no stock in this argument. It is difficult to understand what the trial court meant. Whether it meant there was a conflict of evidence upon the material issues or merely a conflict on some minor points or questions is uncertain. If this court had the power (which it does not seem to have—*C. B. & Q. Rld.* v. *Chicago*, 166 U. S., 242 to 246) to grant a new trial on the weight of the evidence and overrule the lower court for failure to do so, we would have no objection to discussing such question, because it is clear that the evidence was wholly insufficient to support a verdict for the plaintiff. It is not pretended that the court could do in this case what was done by the Circuit Court

of Appeals for the Sixth Circuit in *Felton* v. *Spiro*, 78 Fed., 581, where the case was simply sent back to the lower court, with instructions to reconsider a motion for a new trial. No new trial, however, was granted by the Circuit Court of Appeals in that case. It did not pretend to have that power, and it is admitted in the case at bar that the judge who tried the cause is no longer in office. So it would be useless to send a case back to him to reconsider his action on a motion for a new trial.

In the case of *Clyde Mattox* v. *United States*, 146 U. S., 140, cited by plaintiff in error in her former brief, this court simply held that the trial court erred in not admitting as evidence and then taking into consideration on a motion for a new trial affidavits concerning the misconduct of jurors, and for other errors committed a new trial was granted.

We are willing this court should review the entire evidence, as we are confident that in so doing it would hold that a verdict should have been directed for the defendant.

As the plaintiff was not prejudiced, we respectfully submit that the judgment should be affirmed.

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Counsel.

No. 269.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 269.

JOSEPHINE DESERANT, ADMINISTRATRIX, &C.,
PLAINTIFF IN ERROR,

vs.

CERILLOS COAL RAILROAD COMPANY.

OPINION OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO IN CERILLOS COAL RAILROAD CO. vs. DESERANT, 49 PACIFIC REPORTER, 807.

CERRILLOS COAL R. CO.
vs.
DESERANT.

(Supreme Court of New Mexico, August 6, 1897.)

Injury to servant—Vice-principal—Dangerous premises—Assumption of risk—Master and fellow-servant—Combined negligence—Fellow-servants—Cause of accident—Conflicting theories—Competency of servants—Statutory precautions—Negligence—Damages.

1. A coal mining company's employé, whose duty it is to make rounds of inspection, and advise the miners as they go to work of the condition of their places as to the presence of dangerous gases, represents the company in the discharge of that duty.

2. A coal mining company was accustomed to place a danger signal on rooms in which standing gas had been detected, and such signal was well understood by all employés to be an imperative command prohibiting entrance with a naked light into any room or place where danger was thus indicated. There was no danger from the standing gas if it were not ignited. An employé went to work in the mine with knowledge of the rule, and that an explosion in another room would endanger life in his own room, and relying on his fellow-servant's observance of the danger signal. *Held*, that he assumed the risk, and the company was not chargeable with negligence in not providing a safer place in which to work.
3. Where there is combined negligence of a master and a fellow-servant, a servant is precluded from a recovery for personal injuries if the master's negligence was known to him, and acquiesced in without complaint, and was the efficient proximate cause of injury.
4. A coal mining company's employés who assist in the getting out of coal, without actually drilling holes or doing any blasting with powder, are fellow-servants of employés who are so engaged, and are paid according to the quantity of coal mined.
5. In an action for injuries causing death, where there are two theories of the accident, one exempting defendant from liability and the other not, and there is evidence to support both, it is error to fail to submit both theories under appropriate instructions.
6. A master's duty to see that his servants are competent is discharged when he has taken all reasonable precautions to inquire into the competency of one proposing to enter his service, and, as a result, is satisfied that the applicant is competent.
7. It is error to submit an issue not raised by the pleadings or evidence, where it carries into the case many details calculated to mislead the jury and draw their minds away from the questions at issue.
8. Where it is purely speculation as to which of two ways an explosion causing injuries originated, verdict should be for defendant, if by either or both defendant was exempt from liability.
9. Under act of Congress, March 3, 1891, providing that managers of coal mines shall provide adequate ventilation, but not prescribing the means to be adopted, failure to comply with the requirement is not negligence *per se*, but a reasonable effort must be exerted to maintain such ventilation, and if this were not maintained, it is for the jury to say whether, under all the circumstances, the failure was due to negligence of the manager.
10. In an action for injuries causing death, the measure of compensatory damages is the present worth of the life of deceased, determined by the jury from the evidence as to age, earning capacity, health, habits, and probable duration of life; but with nothing added by way of solatium to the distributees, and nothing for suffering by deceased.

11. To give exemplary damages against a corporation in an action for injuries causing death, it must be shown by a preponderance of evidence that defendant exhibited such entire want of care as showed a conscious indifference to consequences, or participated in a bad intent.

Error to district court, Santa Fé county; before Justice N. B. Laughlin.

Action by Josephine Deserant, administratrix, against the Cerrillos Coal Railroad Company for the death of plaintiff's intestate.

From a judgment in favor of plaintiff, defendant brings error.

Reversed.

H. L. Waldo and R. E. Twitchell for plaintiff in error.
N. B. Field and F. W. Clancey for defendant in error.

COLLIER, *J.*:

For convenience, the parties to this record will in this opinion be referred to as they appeared in the lower court—*i. e.*, plaintiff in error will be called defendant, and *vice versa*. This is an action by the administratrix of Henri Deserant, deceased, against the Cerrillos Coal Railroad Company, in which damages are claimed for negligence in causing death in its mine, called the "White Ash mine," on Wednesday, February 27, 1895, as a result of an explosion occurring about 10.45 o'clock in the forenoon. The declaration charges the negligence in various ways conducing to bring about or cause said explosion, but the evidence will be at present considered only as it bears upon the theory which plaintiff's counsel have most insistently urged upon us. This theory is that in room 8 of the fourth left entry of said mine defendant negligently permitted to accumulate and to remain standing for at least 48 hours prior to the explosion gas in dangerous quantity and ratio to the surrounding air, and

that the explosion occurred in the presence of the ordinary naked lighted miners'-cap lamp, and that the same was exploded by employés of the company, producing after-damp, fatal to life, and causing the death of plaintiff's intestate in room 17 of said fourth left entry, the working place to which he had been sent by defendant. It appears that by this explosion all the employés, 23 in number, who were at the time in the fourth left entry (except those in what was called the "plane") were killed, and therefore all evidence to show how the explosion occurred and where was its initial point is necessarily circumstantial.

The fire boss was an employé whose duty it was to inspect the working places and inform miners, like deceased, who work by contract—*i. e.*, were paid according to the quantity of coal mined—of the condition as to safety of their working places; and he told, or, as he expresses it, he must have told, the deceased that his working place was safe when he went to work at 7 o'clock on the morning of the explosion. As to this duty, the fire boss must be considered, we think, beyond question, as representing the defendant. Thus it is expressly held in Cullen *vs.* Norton, 52 Hun., 9; 4 N. Y. Supp., 774, that a foreman intrusted with the performance of work stands in the place of and represents the master in assigning the servant to his place of labor. And in Railroad Co. *vs.* Herbert, 116 U. S., 642; 6 Sup. Ct., 590, it is held that "if no one is appointed by a railway company to look after the condition of its cars and see that the machinery and appliances used to move and to stop them are kept in repair and good working order, it is liable for the injuries caused thereby. If one is appointed by it, charged by it with that duty, and the injuries result from his negligence in its performance, the company is liable. He is, so far as that duty is concerned, the representative of the company."

The fire boss had, in his round of inspection two days before the explosion, discovered standing gas in said room 8 (how much does not appear), which caused him to place

therein a danger signal, being what is known as the "fire boss' danger mark, a double X, or XX, with date and initial letters of his name. It is shown that such a signal was well understood by all employés to be an imperative command forbidding entrance with a naked light into any room or place where danger was thus indicated. The fire boss did not go again into room 8 until after the explosion, nor is there anything to show that any effort was made to clear this room of standing gas, which, by means of the safety or Davy lamp, he had detected there, notwithstanding that room 8 was considered the worst room in the mine for generating gas. It does not appear in precisely what place in room 8 the danger signal was placed, the fire boss merely saying it was "above the last cross-cut." After the explosion there were found in this room the corpses of two miners, Kelly and Flick; that of Kelly in the cross-cut and that of Flick in the center of the track, about the end—that is, half way up between the cross-cut and the face of the room, about 45 feet from the cross-cut. A tie with fire-danger mark on it was found lying across the track opposite the cross-cut. The track was partially taken up. There were implements there commonly used for such purposes, and there were there also two miners' caps and the lamps which carry a naked light, which indicated that Kelly and Flick had gone to room 8 to take up the track, and had partially succeeded when the explosion occurred. According to the plan of ventilation the air should, as to the rooms in the fourth left entry, have gone first to room 18, and by brattice or curtains been carried around its face, thence by cross-cut to room 17, carried around face, and so on to the rooms lower numbered in consecutive order, until arriving at the third left entry air course, being drawn through all air courses and entries by an exhaust fan at the exit from the mine. It is agreed also between all witnesses that a gas explosion in a mine invariably flies against the air, and therefore, if there were an explosion in

room 8, it would have flown toward room 17, where the body of plaintiff's intestate was found, if air were circulating, as the testimony shows, through the fourth left entry of said mine. Defendant produced a considerable amount of evidence showing air circulation, and what was produced by plaintiff tended to show, at most, only a partial obstruction of the fourth left air course, diminishing, but not destroying, the current, the effect of which will be considered in another place in this opinion. We may assume, therefore, that there was undoubtedly some air current, because this seems necessary for plaintiff's theory of the effect of the explosion being carried back to room 17, and, further, because there is nothing tending to show the entire absence of an air current going in the direction intended.

The rule adopted in the White Ash mine of the fire boss making rounds of inspection and advising miners as they went to work of the condition of their places as to safety, and the fact that all employés well understood that danger signals were used in the mine to prevent entrance into particular places or rooms, presupposed that deceased and his coemployés knew that work was or might be carried on without cessation though there might be standing gas in places or rooms of the mine, and that they understood, when informed that their working places were safe, that such representation did not mean there was no standing gas in the mine or in any particular entry of the mine. It can hardly be denied that if the fire boss, on the morning of Deserant's going to work in room 17, had expressly told him there was standing gas in room 8, but it was marked with a danger signal, and Deserant had, nevertheless, gone to his place to work, the presence of such gas could not be urged as negligence by defendant causing his death unless it were also shown that the room was not danger-marked. If the evidence shows that he impliedly agreed to such a condition, the same conclusion should follow. In Sullivan *vs.* Manufacturing Co., 113

Mass., 396, Devens, J., states the rule to be that "where the servant assents to occupy the place prepared for him and incur the danger to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master to make it so. · Having consented to serve in the way and manner in which the business was conducted, he has no ground of complaint, even if reasonable precautions have been neglected." If in the case at bar "the business was conducted" by placing a danger signal where there was standing gas, it will not do to say the defendant should, in addition, have placed a man on duty to watch and warn against entrance with naked light, because it might be thought, as a reasonable precaution, such was demanded. In Naylor *vs.* Railway Co. (Wis.), 11 N. W., 24, it is held that "if a servant, knowing the hazard of his employment as the business was conducted, is injured while employed in such business, he cannot maintain an action against the master for such injury, because he may show there is a safer mode in which the business might have been conducted, and that had it been conducted in that way he would not have been injured." To the same effect, also, is Hewitt *vs.* Railroad Co. (Mich.), 34 N. W., 659. In Sheets *vs.* Railway Co. (Ind. Sup.), 39 N. E., 154, it was ruled that "where the foot of deceased was caught in an unblocked switch, and he is run upon and killed by the careless act of the engineer in kicking cars with great and unnecessary force, the railway company was not liable, because it was the act of a fellow-servant, and the fact of the frog being unblocked does not change the rule, as that was a danger known to the deceased, making the accident a risk incident to the service." Before that the Indiana supreme court held to the same effect in Railroad Co. *vs.* Henderson, 33 N. E., 1021, where

the defect known to the plaintiff and defendant alike was in the road-bed. The two cases just cited show defects which it was the plain duty of the master to have remedied, but knowledge and an appreciation of danger by plaintiffs were held to defeat their action. It is not suggested anywhere in argument that Deserant did not thoroughly realize that if an explosion occurred from standing gas in the vicinity of his working place his life would be endangered. He was a man 53 years of age, was a miner by occupation, and had worked formerly in the White Ash mine, and again for seven weeks immediately prior to his death. It can scarcely be thought that, if he supposed that the danger signals were negligently or willfully disregarded, his life would not not be jeopardized by explosive gas.

To similar effect of the cases above cited are those of Ladd *vs.* Railroad Co., 119 Mass., 412; Hayden *vs.* Railway Co., 29 Conn., 548; Goltz *vs.* Railway Co. (Wis.), 44 N. W., 752, and Haley *vs.* Lumber Co. (Wis.), 51 N. W., 321. Our Supreme Court has also held that the "rule of law perfectly well settled" is as follows: "If the servant, before he enters the service, knows, or afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow-servant in connection with which or with whom he is to labor is unsafe or unfit in any particular, and if, notwithstanding such knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him" (Alexander *vs.* Mining Co., 3 N. M., 255; 3 Pac., 740). In the case of Railroad Co. *vs.* Baugh, 149 U. S., 368; 13 Sup. Ct., 914, it is said that "where the master has performed his duty in providing his servant with a reasonably safe place at which to work, he is not liable to any one of his servants for the acts

or negligence of any mere fellow-servant, or coemployé of such servant, where the fellow-servant or coemployé does not sustain a representative relation to the master." Again, in the Baugh case it is said, "If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty then there should be some personal wrong on the part of the employer before he is held liable therefor." If the doctrine laid down by the Massachusetts supreme court in the Sullivan case, *supra*, is correct, and the defendant had complied with its positive duty to the satisfaction of plaintiff's intestate, there was certainly no personal wrong done by it, and then if explosion came from ignition by the naked lamp of Flick or Kelly entering room 8, that was the act or negligence of the co-employé. In the Herbert case, *supra*, the court approved the decision in Beeson *vs.* Mining Co., 57 Cal., 20, as being in harmony with its own views where the injury ensued from the defective pipe put in by a tinner, which defective pipe caused a fire and death of plaintiff's intestate, holding that for such a pipe the master was responsible, but the decision expressly states that "it did not appear that the deceased knew or had reason to know of the defect." In Railroad Co. *vs.* McDade, 135 U. S., 554; 10 Sup. Ct., 1044, it is held that employers "are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery, which was or ought to have been known to him, and was unknown to the employé or servant. But if the employé knew the defect in the machinery from which the injury happened, and yet remained in the service, without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably

to be apprehended from such use, and is entitled to no recovery." In Kane *vs.* Railway Co., 128 U. S., 91; 9 Sup. Ct., 16, Harlan, J., says: "It is undoubtedly the law that an employé is guilty of contributory negligence, which will defeat his right of recovery for injuries sustained in the course of his employment, when such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so." The horns of a dilemma seem here presented to plaintiff. If standing gas in this mine was an obvious danger, the deceased was guilty of contributory negligence. If it was not in fact an obvious danger, it was only because deceased relied upon observance by his co-employés of the rule forbidding entrance into a room where a danger signal was posted. There is nothing to indicate in any way that there was any danger from this standing gas, if it were not ignited by going into its presence with a naked light; and if this were provided against in a way known to deceased the existence of standing gas cannot, we think, be considered as making his place unsafe, or, if unsafe, only in such a way as he assented to. In Hough *vs.* Railway Co., 100 U. S., 224, it is said that "if the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death." It would be strange if it could be argued that, though an action by the engineer could not be maintained under such circumstances, yet the fireman, having similar knowledge and continuing without complaint to ride on the engine used by an engineer, could recover. In District of Columbia *vs.* McElligott, 117 U. S., 621; 6 Sup. Ct., 884, it was held, in effect, that if the jury deemed it reckless carelessness in a laborer to work near a

ngerous bank for any length of time, however brief, then he ld not recover, though injured while waiting the fulfill- nt of the master's promise to send assistance so as to guard n against apprehended injury. There is no lack of recogni- n by us of the well-established doctrine that where there is nbined negligence of an employer and fellow-servant, the ster is liable for injury inflicted in the course of employ- nt. But the cases we have referred to show, even if we ncede failure of duty in this case on the part of the mine- ner, that if such failure is known and acquiesced in with- complaint, and is the efficient, proximate cause of injury, servant is precluded from recovery. All these cases we ve cited are in entire accord with Railway Co. *vs.* Cum- ngs, 106 U. S., 700; 1 Sup. Ct., 493, which states the neral principle of liability of the master where he con- outes to the injury, as this case speaks in no way of owledge of defects or of failure of duty of employer had the injured servant; and as far as our investigation has ne none of the cases following this principle deny the ct of knowledge by the employé killed or injured.

f Flick and Kelly were fellow-servants of deceased, and vas by their act or negligence, in disobedience of the im- rative command given by the danger signal, that death sued, it seems clear no recovery can be had upon the ory of explosion originating in room 8. In this we have umed that deceased agreed to work in the White Ash ne, with rooms containing dangerous gas, merely guarded a fire-mark or danger signal—at least there was evi- nce altogether sufficient for the court to have explicitly tructed the jury on this question, and it wholly omitted do so; but we will discuss the court's instructions ther on. While there are many decisions from which it ght be strongly argued that the standing gas in room 8 ld not be considered the proximate cause of the death of plaintiff's intestate, because the act of Flick and Kelly s an intervening act of such character as to break

the chain of causation, and because it was not probable or reasonably to be expected, with the safeguards employed to prevent entrance into a room where there was standing gas, that an explosion and consequent death would occur, yet, upon the principle rigidly stated in the Cummings case, *supra*, it seems to the writer, at least, that these decisions, among which are those of Sheffer *vs.* Railway Co., 105 U. S., 249, and Railroad Co. *vs.* Kellogg, 94 U. S., 469, and the argument upon which they proceed, do not apply. It is preferred, therefore, to place our conclusion upon the ground that the master in this case is not shown to be guilty of negligence of which plaintiff's intestate can complain, as he accepted, or at least there is evidence tending to show that he accepted, employment with an implied waiver as to there being standing gas in places in said mine, provided they were guarded by a danger signal. If injury resulted from a fellow-servant's act or negligence under such circumstances, such injury must be considered to have arisen from the risk incident to the employment. That Flick and Kelly were fellow-servants of the deceased, they being "companymen," employed in assisting in the getting out of coal without actually drilling holes or doing any blasting with powder, as deceased was engaged in doing, we hold to be clear; and, without discussing the question so much gone over, we again cite the Baugh case, *supra*, and also that of Railroad Co. *vs.* Charless, 162 U. S., 359; 16 Sup. Ct., 848. We will close the discussion of this branch of the case by quoting from the case of Berns *vs.* Coal Co., 27 W. Va., 285, as follows: "If, therefore, it appears that the proprietors of the mine had been negligent in permitting fire-damp to accumulate in their mine, which would not produce any injury until ignited, and if it were ignited by a fellow-servant who went into the dangerous part of the mine with a lighted lamp, contrary to the orders of the proprietors of the mine, and by such lighted lamp the fire-damp was ignited and exploded, by which the servants were injured, such explo-

sion and injury would be directly and immediately caused by the act of the fellow-servant, and not by the negligence of the master, and the master would not be responsible for such injury."

The other theory advanced as to the explosion is that it was not simply a gas explosion, but was a gas and powder explosion, originating in one of the rooms in the fourth left entry, where work in getting out coal was going on, these rooms running from 12 to 18, inclusive, and that it was caused by what is known as a "gunning or windy shot." This kind of shot was described as being caused by an insufficiency of powder to break the coal, or from insufficient or careless tamping. In either event there would issue from the hole drilled into the coal a sheet of flame, extending in some instances a distance of 60 or 70 feet. This flame, it was testified, would ignite dust, impregnating the air and cause explosion where the gas only amounted to 1½ to 2 per cent., so small as not to explode in the presence of naked lights carried on the caps of the miners. These gunning or windy shots are shown to "occur occasionally, but are not a regular occurrence." This theory was sought to be maintained by the defense. In the brief of its counsel it is urged that a windy or gunning shot is evidence of negligence by fellow-servants, and that if an explosion so occurred the defendant should be held exempt from liability. In the first place, it is not at all clearly shown that such a shot is evidence of negligence, and even if it were we do not think that under the Cummings case, *supra*, such would necessarily excuse the defendant from liability. These shots were not so rare as to be improbable, and there was testimony pro and con as to the quality of the air. If the jury believed from a preponderance of the evidence that the air was bad and made so by partial obstruction of the air course, and that such obstruction was negligence of the defendant, which resulted in the accumulation of gas of sufficiently large percentage to be exploded by a gunning shot, and they further

believed that defendant should have reasonably anticipated such accumulation from this cause, the fact that gunning shots evidenced contributory negligence by fellow-servants would not prevent the returning of a verdict against the defendant. It appears in evidence that the presence of this gas is not perceptible to the senses, and that it is an insidious and not an obvious danger. The jury might believe, under proper instructions, that deceased would not be guilty of contributory negligence in continuing at work until an explosion resulted from a gunning shot, or that the mere presence of bad air, if there was bad air, was a sufficient warning to him to retire to safety, as it is in testimony that frequently the air would be better and worse in the mine. If, however, the jury should believe that defendant caused to circulate through the mine the statutory quantity of air, and that an explosion nevertheless occurred, whether from a gunning shot or by ignition from naked lights, because of an accumulation of gas casually occurring, then defendant should not be held liable, as to hold otherwise would be to make defendant a guarantor of safety in the working places, when instead an explosion from an accumulation of gas so casually occurring is to be considered a risk incident to the employment in which deceased was engaged. We are unable to say upon which theory the jury found defendant liable in this case, but the court was in error in not clearly drawing to their attention the law applicable to each theory.

These instructions were error also in other respects. Their general import as to everything relating to the duty of the defendant was not that reasonable diligence and care should be exercised by defendant in an endeavor to perform its duty, but that the duty must be performed or it be deemed guilty of "culpable negligence." We so understand instruction 7, and, if it was intended to lessen the severity by No. 8, the language is not explicit enough to effectuate that intention. Thus, in No. 7, the court instructs that it was incumbent on defendant to employ fit, suitable, competent,

and experienced men to operate and manage the mine, while in the Baugh case, *supra*, we find the following language: "If the master has taken all reasonable precautions to inquire into the competency of any one proposing to enter his service, and, as a result of such reasonable inquiry, is satisfied that the employé is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this notwithstanding that, after the servant has been employed, it shall be disclosed that he was incompetent and unfit? No human inquiry, no possible precaution, is sufficient to absolutely determine whether a party under certain exigencies will or will not do a negligent act. * * * Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act, resulting in injury to a fellow-servant, does not in itself prove any omission of care on the part of the master in his employment." The portion of the instructions of the learned judge that it was incumbent on defendant to employ and use proper, necessary, and suitable machinery and appliances for forcing a sufficient and necessary quantity of pure air into the said White Ash mine, etc., should not have been given, as no attack whatever was made upon the system or plan of ventilation, and this was calculated to mislead the jury and draw their minds away from the questions at issue. The instruction that it was "incumbent on the defendant to keep open all air courses, slopes, cross-cuts, entries, and cross-entries in said mine for the proper, necessary, free, and unmolested circulation of the air in said mine while the men were working therein, and to provide an adequate amount of pure air for the safe and proper ventilation of said mine, for the protection, safety, comfort, and convenience of the men so working in said mine, at the time and immediately prior to the time of the alleged explosion, and at the time of the death of plaintiff's intestate," is also objected to. This is faulty in that it strongly implies that the defendant guaranteed all these things. It is con-

ceded that it is the positive duty of the master to make the place of work reasonably safe; but, again quoting from the Baugh case, we find that this "positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety." The including also of all the things mentioned in the instructions, such as keeping open all air courses, slopes, cross-cuts, entries, and cross-entries," and providing for "comfort" and "convenience," etc., has the effect of carrying into the case questions tending to confuse the jury and to make them hunt about for faults committed by the defendant having no bearing upon or connection with the questions involved at the trial. All this may have been done upon the theory that the act of Congress embodied in the instructions required such strict performance by the defendant as to make non-performance not merely evidence of negligence, but negligence *per se*. In the first place, if it might even be held that this showed negligence *per se*, there was no evidence going to show that any slope, cross-cut, entry, or cross-entry was not open, or that the comfort or convenience of any miner was impaired, but there was evidence to show one air course partially obstructed. To the ignition theory in room 8 this part of the instructions could have no reference under the view we have taken of this case.

The act of Congress passed March 3, 1891, provides that managers or owners of coal mines shall provide adequate ventilation of not less than so many cubic feet of air per minute for so many men, and by proper appliances force same through the mine to the face of each working place, so as to dilute and render harmless noxious and poisonous gases, and to keep all working places clear of standing gas. It has been laid down in a recent work of high authority that a breach of statutory duty is negligence *per se* (3 Elliott, Ev., § 1155). Such, however, does not seem to be the view of the United States Supreme Court. That court, speaking by Mr. Justice Lamar, in the case of Railway Co. *vs.* Ives,

144 U. S., 408; 12 Sup. Ct., 679, where the question related to the violation of an ordinance prohibiting the running of trains at greater than a named speed, after noticing the conflict in authority on such question, says: "Perhaps the better or more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." Breaches of statute or ordinance were similarly treated in the cases of Randall *vs.* Railroad Co., 109 U. S., 485; 3 Sup. Ct., 322; Hayes *vs.* Railroad Co., 111 U. S., 228; 4 Sup. Ct., 369, and Railway Co. *vs.* McDonald, 152 U. S., 282; 14 Sup. Ct., 619. Where the means to be adopted for securing requisite ventilation were not prescribed, but Congress contented itself with general directions, it should be held that reasonable effort is to be exerted to attain and maintain this result. If this result were neither attained nor maintained, it would then be the jury's province to say whether, under all the circumstances, this failure was or was not due to negligence by the defendant.

Instruction 9 should not have been given, as it is not considered that such an instruction had any possible application to this case, except as to violation by Flick and Kelly of the rule against entering places marked with danger signals, and we have already indicated what the court should have done in that regard. All the instructions must be changed, from 7 down to 14, inclusive, on the lines we have indicated, and it is unnecessary to further specially advert to them.

It is our view that, upon the record as it comes before us, the court should have, clearly and in a distinguishing way, submitted to the jury the theories of explosion originating in room 8 and of its originating elsewhere in the fourth left entry of the mine. The instructions should have told the jury in effect, as to the explosion originating in room 8,

that if they believed it there originated, and that deceased consented to work in said mine with places dangerous because of standing gas, guarded by danger signals, and knew or had good reasons to know that the business of the mine was conducted in this way, and should further believe that the standing gas was exploded in such room by the miners Flick and Kelly or either of them, then such explosion was by act of negligence of the fellow-servants of the deceased, and for plaintiff to recover it must be shown to the jury by a preponderance of the evidence that the said room was not danger-marked by defendant at the time Flick and Kelly entered the same with naked lights. The court should have submitted the other theory, upon the proposition of defendant's negligently or not permitting gas to be generated and remain in and around the working places in the mine, upon the lines we have laid down. The court should further have instructed the jury that if it were not shown by a preponderance of the evidence where or in what way the explosion originated, one of the ways exempting from liability and the other not, a verdict should be returned for defendant. We do not intend by this opinion to prescribe any form of instructions, but rather to indicate the general line upon which they should proceed.

Only one other question is it deemed necessary for this opinion to refer to, and that is upon the measure of damages. The personal representative of the deceased is merely the nominal or statutory plaintiff in this action. Thus it appears that she will be a distributee, along with her five children, of whatever may be finally recovered in this action, while as to the two cases consolidated with this upon the trial, she has no pecuniary interest in the result; yet as administratrix of her husband and each of her two sons, all killed at the same time in said fourth left entry, she is the plaintiff in each case. It is plain that the court should not have instructed that a nominal plaintiff could recover for loss of comforts and protection. It may be that this

language is merely inaccurate and does no harm if the rule of damages is otherwise correctly stated. The rule in statutory actions for injuries causing death is, as shown by abundance of authority, that the damage recoverable is compensation for the pecuniary loss to the parties entitled to recovery (Railroad Co. *vs.* Morris, 26 Ill., 400; Conant *vs.* Griffin, 48 Ill., 412; Railroad Co. *vs.* Butler, 57 Pa. St., 338; Telfer *vs.* Railroad Co., 30 N. J. Law, 199; Brady *vs.* Chicago, 4 Biss., 451; Fed. Cas. No. 1796; Railroad Co. *vs.* Paulk, 24 Ga., 366; Moffatt *vs.* Tenney (Colo. Sup.), 30 Pac., 348). It cannot be readily seen how, arguing from the relations and obligations of one human being towards another, the life of any one can be of pecuniary value to another, except it be the life of a husband and father to his wife and children, to whom he owes support and education. It must be considered, however, that as our statute gives a right of recovery to any one who is of kin, in the same way that it gives it to the wife and children of deceased, merely prescribing who are prior distributees of what is recovered, the rule for estimating the loss in each case should be the same. Such a rule must be that from the proof as to age, earning capacity, health, habits, and probable duration of life the jury shall say what is the present worth of the life of deceased, with nothing to be added by way of solatium to the parties or party entitled as distributees to the proceeds of recovery and nothing for suffering or anguish of mind or body by the deceased. It is resolved into a cold question of dollars, with sentiment in no way to be taken into account. Neither does the question of mitigating or aggravating circumstances have any weight, so far as the damages denominated by our statute "compensatory" are concerned. If there should be a recovery, full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation.

Our statute appears to mean that if there are "aggravat-

ing circumstances attending the wrongful act, neglect, or default" for which the defendant is responsible, then exemplary damages should be added to those which are merely compensatory. In the case of Railway Co. *vs.* Prentice, 147 U. S., 101; 13 Sup. Ct., 261, Mr. Justice Gray goes into a very elaborate discussion of exemplary damages as relating to the liability of a corporation therefor, and from it we will deduce our conclusions, that being a court whose decisions should be held controlling with this court. The portion of that decision most applicable to this case is the affirmance of the case of Railway Co. *vs.* Arms, 91 U. S., 495, in which an instruction that if the jury "find that the accident was caused by gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages" was held error. The court said that, whether that was called "gross" or "ordinary" negligence, the jury could not give damages beyond the limit of compensation. "To give exemplary damages there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference of consequences." The words of our statute do not, we think, change the rule thus announced, but circumstances of aggravation to bind the principal for the act of the agent must be as above stated, or where the principal participated in a bad intent. The decision in Railway Co. *vs.* Harris, 122 U. S., 610; 7 Sup. Ct., 1286, was approved in holding the corporation liable for exemplary damages; but this was because the corporation, by its governing officers, participated in and directed all that was done, the thing done being in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by another company. There bad intent by the corporation was proven. There is nothing in this record that tends in the least to show bad intent on the part of the defendant, nor is there anything to show that a servant, knowingly unfit, was employed or retained whose unfitness would or did expose its employés to danger, or any-

thing from which an argument might have been advanced that defendant was so careless of the lives of its employés that a presumption of conscious indifference as to consequences arose, unless the obstruction of the fourth left air course may be thought to show it. The defendant is shown to have resorted as usual to its inspections, and the air in the mine was never bad enough to be a warning to the employés to desist from working, even if we disregard all testimony that it was not bad at all. We scarcely think there was sufficient basis for any instruction as to exemplary damages, but if there should be produced sufficient evidence on a retrial, the court should inform the jury that exemplary damages may be added to compensatory damages if it is shown by a preponderance of evidence that the defendant exhibited such entire want of care as showed a conscious indifference to consequences. Mere neglect of a fellow-servant, however gross, would not authorize exemplary damages, unless defendant, knowing his unfitness, employed or retained him or in some way ratified his act. If there is evidence on a retrial on this subject, an instruction as to exemplary damages should be given. At all events, the jury should be explicitly informed of the nature of exemplary damages, and their attention confined to a consideration of what in the evidence, in the way of aggravating circumstances, may warrant their being given. Wherefore it is considered that the refusal of the lower court to award a new trial was error, and a new trial should be granted; this case to be remanded, with directions to the lower court to grant the same.

Smith, C. J., and Hamilton and Bantz, JJ., concur.